SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRUMP MARKS LLC,	:	
Plaintiff,	:	Index No.: 08/601372
	:	(Cahn, J.)
-against-	:	
CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENJN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CRESCENT'S MOTION TO DISMISS

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Defendant Crescent Heights Diamond, LLC ("Crescent") respectfully submits this reply memorandum of law (1) in further support of its motion to dismiss the Complaint pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1); and (2) in opposition to plaintiff's premature, pre-discovery, pre-answer "cross-motion" for summary judgment.

PRELIMINARY STATEMENT

This is a case of licensor's remorse. A sophisticated business asks this Court not only to rewrite a straightforward agreement, but to turn plaintiff from licensor to partner/investor in the hope of capitalizing on a lost business opportunity. Plaintiff's frequent repetition of the amount realized by Crescent in its sale of the land makes clear that this is not about a breach of contract, but the fact that Crescent realized a smart profit that Trump wishes it had the foresight to recognize. Whatever Trump says now, whatever language it wishes to excise or change after the fact, it signed a "*License* Agreement." It was not a partner, not a joint venturer, not an investor. All Trump did was secure the opportunity, if a *future* building were built on this future assemblage property, to have its name on the building and garner royalties – nothing more, nothing less. The Complaint, which seeks to convert a licensing agreement into an investment, must be dismissed.

As Trump certainly knows, no developer, certainly not Crescent, would covenant to build on land it did not own with zoning approval still required. Did the parties contemplate that a building might not be built? Of course they did; that is Section 8(h), which anticipates both unavoidable *and* avoidable reasons for a failure to commence construction. Under Section 8(h), failure to build is anything but a breach. It is a contemplated and negotiated possibility.

In its effort to have this Court convert this License Agreement into a partnership, Trump ignores an entire section of Crescent's opening brief § I(B), *i.e.*, "Even if Crescent Did

Breach, Plaintiff's Only Remedy is Termination of the Contract." What is plaintiff's answer? There is no answer. The point is conceded. For this reason *alone*, the contract claim should be dismissed, as should the other claims which fall like dominoes once the contract claim fails. Indeed, plaintiff only gives mere lip service to its good faith, unjust enrichment, and indemnification claims, all piggyback claims for which it is now clear there is no legal support.

The Complaint may have been an interesting exercise in creative pleading, but it does not withstand scrutiny. The motion to dismiss should be granted in its entirety.

STATEMENT OF FACTS

Apparently unable to deal with its own Complaint, plaintiff strains repeatedly and improperly to insert new material outside the Complaint in opposition to the motion to dismiss. That is improper. Crescent will solely address the facts in the Complaint and the documents attached, rather than plaintiff's improperly introduced affidavits and parol evidence.[1]

ARGUMENT

I. THE MOTION TO DISMISS SHOULD BE GRANTED

A. The Contract Claim Should Be Dismissed

1. Even if Crescent Did Breach, Plaintiff's Only Remedy is Termination

Crescent did not breach. *See* § I(A)(2), *infra*. But even assuming, *arguendo*, that Crescent did breach, the Complaint still fails to state a claim, because Trump's *only* remedy is termination of the Agreement. *Plaintiff does not even attempt to address this irrefutable point anywhere in its opposition brief*, and with good reason: plaintiff simply has no answer to this dispositive argument.

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[1] CPLR 3014; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976) (per curiam) ("[A]ffidavits received on an unconverted motion to dismiss . . . are not to be examined for the purpose of determining whether there is evidentiary support for the pleading."); *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dep't 2007).

The sole and exclusive remedy that the Agreement provides for failure to commence construction within twenty-four months is "the absolute right to terminate this Agreement and the rights licensed *hereunder*" and "any other right or remedy of [Trump] *hereunder*." Agmt. § 8. It is also now undisputed that the *only* monetary remedies set forth "hereunder" are royalties under Section 8(l) and Exhibit A, neither of which applies without either a construction permit or delivery of units to third parties in the future building. Plaintiff does not dispute that the Agreement nowhere hints at a damages remedy if a building is not constructed or the land sold. To the contrary, the Agreement expressly provides for a specific, limited remedy in that situation: termination of the Agreement, revocation of the license. Trump is limited to the defined remedies that it bargained for in the Agreement. *See W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990).

Plaintiff not only fails to address the remedy argument; plaintiff also fails to cite the leading case on limitation of remedies in New York State. In its opening brief, defendant spent over two pages discussing *Kenford Co. v. County of Erie*, 73 N.Y.2d 312 (1989), the controlling Court of Appeals case on limitation of contract remedies. Incredibly, plaintiff does not even cite the case, much less attempt to distinguish it.

Kenford held unequivocally: "damages which may be recovered by a party for breach of contract are restricted to those damages which were reasonably foreseen or contemplated by the parties during their negotiations or at the time the contract was executed. The evident purpose of this well-accepted principle of contract law is to limit the liability for unassumed risks of one entering into a contract and, thus, diminish the risk of business enterprise." *Id.* at 321. In *Kenford*, one party "obviously anticipated and expected that it would reap financial benefits from an anticipated dramatic increase in the value of its peripheral lands

upon the completion of the proposed domed stadium facility," but that expectation did not "translate into cognizable breach of contract damages since there is no indication whatsoever that the County reasonably contemplated . . . that it was to assume liability for Kenford's unfulfilled land appreciation expectations in the event that the stadium was not built." *Id.* at 322. Here Trump says it anticipated various profits if Crescent managed to acquire title to land it did not fully own, then secure permits, then build a building, then sell units in that building. But there is "no indication whatsoever that [Crescent] reasonably contemplated that it was to assume liability . . . in the event that the [building] was not built." *Id.* Where is that in the Agreement? Given that the Agreement plainly contemplates that the building may not be built, for reasons within Crescent's control, Agmt. § 8(h) and limits Trump to its remedies "hereunder," *id.* § 8, the lack of any other clause providing for damages is telling.[2] Where is the liquidated damages clause? Where is the clause permitting Trump to sue for damages? How could either Trump or Crescent reasonably expect that Trump would share in land sale profits? There are no such clauses. To the contrary, the Agreement sets forth the remedies: termination, and under particular circumstances that do not apply here, certain royalties.

Perhaps realizing it cannot survive this motion under controlling law or under the plain terms of the Agreement, plaintiff resorts to an equitable strawman to persuade the Court to rewrite the Agreement for it. Plaintiff claims no fewer than a dozen times that, notwithstanding the sale of the property, Trump was stuck with a 3 ½ year "negative covenant" restricting its ability to license the Trump brand anywhere else in Tel Aviv after the property was sold. Pl. Br. 3, 4, 6, 7, 17, 20, 21, 23, 24.[3] Indeed, this is the centerpiece of plaintiff's entire opposition brief,

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[2] It is worth reiterating that the License Agreement has an integration clause, Agmt. § 17(d), stating that the Agreement "contains the entire agreement between the parties hereto with respect to the subject matter hereof."

[3] This claim is patently absurd on the geography alone – the License Agreement limits any exclusive use of the

the purported *coup de grace* that justifies its request that the Court rewrite its remedies available under the Agreement. But the self-imposed "restrictive covenant" (self imposed, of course, only for purposes of this litigation, *see* Pl. Br. 21 n.28)[4] is false for at least two reasons.

First, Section 1(g)(C) provides that "nothing contained in this Agreement shall prohibit or restrict Licensor . . . from licensing the Trump name, other than the New Trump Mark" for the operation of hotels, or any other use not expressly prohibited, *anywhere in Israel*. The alleged oh-so-restrictive covenant would allow Trump to build a hotel right around the corner.

Second, by its plain terms, the Agreement imposes this narrow restriction on the Trump name *only* so long as the "Agreement is in full force and effect." Agmt. § 1(g). When the property was sold, no assignment of the Trump license was sought or permitted, *id.* § 12(b), and "the Tower Property [was] no longer . . . known by the New Trump Mark," *id.* § 6; therefore the Agreement "end[ed]" and was no longer in "full force and effect," *id.* §§ 6, 1(g).

This result makes sense given that the entire purpose of the Agreement was to license a name for a building to be built on a specifically identified piece of property. Once that property was sold, there simply was no longer any Agreement. Furthermore, Crescent could not assign its rights under the Agreement, other than to a construction lender. *Id.* § 12(b). If no one had any right to the Trump license for this property any longer, then Trump plainly had no obligation to limit use of the Trump name to a nonexistent building on a nonexistent property.

Plaintiff is creating this equitable strawman because the equities are not on its

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Trump name to a specific area of Tel Aviv, not the entire city. Agmt. § 1(g), Ex. C. Further, plaintiff cannot seriously be claiming that that Tel Aviv "effectively means all of Israel," Pl. Br. 3, an assertion likely to be hotly disputed by residents of Jerusalem, Haifa, and Eilat, among other places.

[4] Plaintiff has attempted to insert into the record a letter it sent Crescent after the sale of the property stating that it is terminating all of plaintiff's obligations pursuant to the Agreement, including the exclusivity agreement. Meister Aff., Ex. H. Plaintiff's contention that it is now restricted by a 3½ year negative covenant is a creature of fiction created for its opposition brief and refuted by the very (improper) evidence it seeks to place before the Court.

side. Plaintiff spent not one penny to purchase the land. Plaintiff spent not one penny to develop any property on the land. Crescent took all of the risk. As (correctly) alleged in the Complaint, Plaintiff's only "investment," other than registering its mark, was Donald Trump's brief appearance (which no doubt generated nice publicity for Mr. Trump) by live-video feed with the Israel Business Conference. Compl. ¶ 20. All of this is not in dispute.

In any event, plaintiff's repeated references to the "restrictive covenant" are beside the point. Its remedy for any default under the plain language of the Agreement was termination, and if applicable, certain royalties, and *no more*. Whatever the equities (and here they certainly do not favor plaintiff, which invested nothing), the Agreement is plain on its face. New York courts are not in the business of rewriting agreements for disgruntled parties, and certainly not for disgruntled "sophisticated and counseled business persons."[5]

The remedy for default is termination. Plaintiff has provided no answer to the dispositive remedy argument. The motion to dismiss the contract claim should be granted.

2. Crescent Did Not Breach

Failing to come up with any argument in response to the remedy point (a failure that dooms plaintiff's contract claim), plaintiff focuses almost entirely upon the breach point. But Crescent did not breach, as a matter of law.

a. Section 3 does not contain a covenant to build.

Plaintiff asks the Court to ignore the basic rules of contract interpretation, and rather consider what it does not allege in the Complaint but now claims were negotiations to defer a $1 million payment in return for a promise to build. Pl. Br. 2-3. Without pleading this manufactured scenario, the plaintiff asks this Court to infer an alleged covenant to build, and

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[5] *Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 198 (2001); *see Cornhusker Farms, Inc. v. Hunts Point Coop. Mkt., Inc.*, 769 N.Y.S.2d 228, 231 (1st Dep't 2003).

read into Section 3 a meaning that cannot be supported by the language of Section 3 in context or the allegations of the Complaint. Pl. Br. 3. In its desire to concoct a nonexistent promise from Section 3, plaintiff improperly ignores the entire purpose, meaning, and context of that Section, which is to assure that the Tower Property, *if built*, would meet the "Trump Standard." *See Kass v. Kass*, 91 N.Y.2d 554, 566 (1998) (words and sentences are interpreted in context, not in isolation).

Although plaintiff claims to agree that "all of [a contract's] provisions" should be given "full meaning and effect," Pl. Br. 15, plaintiff would rather the words "Trump Standard" in the heading to Section 3 be given no effect. Some contracts state that titles and headings are not to be considered in interpreting the contract. This Agreement did not. New York courts routinely consider headings because, in construing a contract, "a reasonable effort must be made to harmonize *all* of its terms." *Superb Gen. Contracting Co. v. City of New York*, 833 N.Y.S.2d 64, 67 (1st Dep't 2007) (emphasis added) (rejecting plaintiff's proposed construction as inconsistent with the contract's heading and other language); *Beltrone Const. Co. v. State*, 592 N.Y.S.2d 832, 834 (3d Dep't 1993) (contract is only susceptible to one interpretation based on a plain reading of the section in its entirety, including the heading); *Coley v. Cohen*, 289 N.Y. 365, 373-74 (1942) ("[W]e examine section 1.02 of the specifications which, by reason of its heading, 'Contractor's Responsibility,' is obviously intended to supplement article X of the contract."). Plaintiff's claim that no New York cases consider headings, Pl. Br. 11, is flat wrong.

When read with its heading, Section 3 is completely harmonious. As noted in the opening brief, every sentence in Section 3 is about quality control and meeting the Trump Standard. *See* Agmt. § (3). Plaintiff simply does not deal with this argument. No reasonable reading of Section 3(a) could convert that section into an obligation to build while still

maintaining the integrity of language entirely focused on maintaining the "Trump Standard" and titled to capture that meaning. Read in context, it can only be reasonably understood to require that if a building is built, it must meet the standards the license requires.

Plaintiff's attempt to distinguish *Long Island R.R. Co. v. Northville* fails. *Northville* expressly *rejected* plaintiff's claim that a licensing agreement for a pipeline contained an express or an implied obligation to build the pipeline. 41 N.Y.2d 455, 461 (1977). This despite the fact that the *Northville* license agreement is strikingly similar to the instant Agreement, stating, under the heading "Construction and Maintenance": "The said pipe line . . . . *shall be erected, constructed and installed*, and the said pipe line and its appurtenances shall be used, operated, maintained, repaired . . ., all at the sole cost and expense of Northville Dock, . . . in all respects as shall be satisfactory to the Railroad, and as shall not jeopardize [the] . . . use, operation, and enjoyment by the Railroad . . . ." Greenberger Aff., Ex. 2 (*Northville* agreement) ¶ 6 (emphasis added). The Court of Appeals refused to read an obligation to construct into the agreement in *Northville*—explaining that it "was purely and simply a license arrangement." 41 N.Y.2d at 461. The Court here should do the same.

b. The remaining sections of the Agreement fail to support plaintiff's claim.

Once Plaintiff's tortured reading of Section 3 is disposed of, it is easy to see that the rest of the Licensing Agreement, when read for its plain language and to give effect to all the terms, plainly contemplates that the building may never come to fruition.

For one, there is the Agreement's title, which plaintiff asks the Court to ignore. Pl. Br. 12. It is not a partnership agreement or a construction agreement. It is a "License Agreement" and no more. If Crescent builds, Trump gets the license. If Crescent does not build, or get the zoning permits, or acquire the land, there is no license.

Section 8 of the Agreement expressly anticipates that no building might ever be built, and describes what happens if Crescent does not begin construction within 24 months:

Trump can terminate the license. Agmt. § 8(h). The building may not be built because of unavoidable reasons beyond Crescent's control, *or* because of avoidable reasons within Crescent's control. Both scenarios are expressly accounted for by Section 8(h). What Section 8 does *not* state (or even suggest) is that an avoidable failure to build is a breach or a default. No section in the Agreement states that.

Section 14(b), "Representations and Warranties; Covenants," lists all of Crescent's covenants under the Agreement. Crescent made many covenants under the Agreement, *see id.*, but a covenant to build was not one of them. Nor is there any covenant to use commercially reasonable or good faith efforts to build.[6]

Failing to come to terms either with Section 8(h) or Section 3, and failing to find any direct support for the non-existent covenant to build, plaintiff cites to Sections 9, 7(b), 6, 4 and 1(a) as indirect support for its theory. But none of these sections imposes a covenant to build (that is undisputed) and all are easily harmonized with the operative section in this case: Section 8(h). If Crescent failed to commence building, as per Section 8(h), plaintiff could terminate the Agreement. *Once Crescent commenced building*, however, Section 8(h) by its terms no longer applies. At this point, once all the conditions precedent (*e.g.*, purchasing the property, getting the zoning permits, getting the construction permit) have been met, and construction has begun, it makes perfect sense that Crescent should not be able to terminate without reason. For example, Crescent could not build the building, then ditch Trump and license someone else's name, without a reason. Section 9 sets forth those grounds for

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[6] The parties knew how to impose "commercially reasonable efforts" when they wanted to. Under Section 14(a)(v), for example, plaintiff covenanted to use "commercially reasonable efforts" to, *inter alia*, protect the Trump Mark.

termination. But nothing in Section 9 in any way conflicts with Section 8(h).

Section 7(b) is similar. It is designed to ensure that Crescent does not drop Trump and use someone else's name on the building, without notice and an opportunity to cure. It has nothing to do with the specific situation contemplated by Section 8(h), where there is no building and construction has not even commenced. Section 6 does not help plaintiff either: it provides only that the Agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark." As set forth *supra*, the Agreement plainly ended when the construction did not commence and the land was sold. Section 4 supports Crescent, not plaintiff. Like Section 3, every sentence is about quality control, not a covenant to build. The point of this section is again to ensure that the Trump Standard is met. But nothing in Section 4 is a covenant to build and nothing contradicts the plain meaning of Section 8(h).

Plaintiff cites Section 1(a), claiming in his brief without any supporting allegations in the Complaint, that "Crescent specifically bargained for, and Plaintiff agreed, to defer the $1,000,000 initial guaranteed minimum royalty payment until the construction permit was issued, in exchange for which, Plaintiff bargained for, and Crescent agreed, to an absolute, unqualified, and unconditional covenant to build the Tower Property." Pl. Br. 2. But, like the Complaint, Section 1(a) says nothing of the sort. *See* Agmt. § 1(a). Nor does any section of the Agreement say anything of the sort. All the Agreement says is that plaintiff receives $1 million only *if* and after a construction permit is issued (by a third party outside the parties' control). *Id.* Ex. A; § 1(a). But plaintiff does not receive the $1 million absent a construction permit. *Id.*[7]

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[7] Plaintiff's claim is not only unsupported, it is absurd on its face. How could the $1 million be consideration for (in plaintiff's words) an "unqualified" and "unconditional" covenant to build, when payment of the $1 million is itself dependent upon the issuance of a construction permit by a third party outside the parties' control? How could Crescent have an "unconditional" covenant to build when it did not even own all the land, Compl. ¶¶ 14, 17, and

Finally, Plaintiff's opposition brief does not address the Agreement's third Whereas clause, which states that Crescent "intends" to develop a building, not that it "will" or "shall" develop a building, or "covenants" or "promises" to build a building. Agmt., 3rd Whereas Cl. There was no covenant to build because, *inter alia*, Crescent did not even own all the land; Compl. ¶¶ 14, 17, a zoning variance was needed, Compl. ¶ 26, and Crescent required a demolition permit under a pre-development loan and, later, a construction permit. Agmt. Ex. A.

The breach of contract claim should be dismissed.

3. Plaintiff Cannot Prove Damages Under the "New Business" Rule

Plaintiff does not dispute that cases are routinely dismissed where, as here, plaintiff seeks speculative lost profits from a potential future business.[8] This is especially the case where, as here: Crescent did not even own the land on which any building was to be built, Compl. ¶ 17; no building like it existed in the entire State of Israel, Compl. ¶ 14; no one could guarantee that a building would ever be built; there was not a single promise by a purchaser or lessor for a condominium unit in the hypothetical, future building; and no one could know whether the sales price of any such future unit would exceed $550/square foot, the threshold below which plaintiff would not receive royalties, Agmt. Ex. A.

All plaintiff can do is point to the $1,000,000 payment due only if a construction permit were issued. First, this is a new allegation. Neither the causes of action in the Complaint nor the Prayer for Relief requests or demands the $1,000,000 payment. Second, that payment was not due unless a construction permit were issued, and none was issued. Third, it is

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construction was contingent on financing for which (the parties anticipated) the entire Agreement would serve as collateral to an institutional construction lender? Agmt. § 12(b).

[8] *See Kenford Co. v. Erie County*, 67 N.Y.2d 257, 261 (1986); *Calip Dairies, Inc. v. Penn Station News Corp.*, 695 N.Y.S.2d 70, 71 (1st Dep't 1999); *Robin Bay Assocs., LLC v. Merrill Lynch & Co.*, No. 07 Civ. 376, 2008 WL 2275902, at *8 (S.D.N.Y. June 3, 2008); *Nineteen New York Properties Ltd. P'ship v. 535 5th Operating Inc.*, 621 N.Y.S.2d 42, 43 (1st Dep't 1995); *Awards.com, LLC v. Kinko's, Inc.*, 834 N.Y.S.2d 147, 152-53 (1st Dep't 2007).

speculative to assume a construction permit would be issued by a third party outside the parties' control. Finally, even if plaintiff were right, and even if the breach of contract claim were not dismissed for the reasons set forth above, then the Court must limit plaintiff's damages to $1,000,000.

B. THE GOOD FAITH AND FAIR DEALING CLAIM SHOULD BE DISMISSED

Plaintiff does nothing to contradict defendant's motion to dismiss the good faith and fair dealing claim, other than to plead for premature discovery. The allegations of the Complaint do not allege any facts that could trigger a good faith and fair dealing claim, especially given Section 8(h) which expressly contemplates that the building might not be built for reasons within Crescent's control. Agmt. § 8(h); *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983). ("No obligation [of good faith and fair dealing] can be implied . . . which would be inconsistent with other terms of the contractual relationship.") Moreover, discovery to attempt to fish for unpleaded facts has no basis. Plaintiff also fails to address, much less distinguish, any of the cases cited in Crescent's moving brief. For the reasons set forth in Crescent's moving brief, the claim should be dismissed.

C. THE UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED

Plaintiff states that "absent a valid and binding contract, Plaintiff is entitled to maintain its unjust enrichment claim." Pl. Br. 24. But there was a valid and binding contract: the License Agreement. Therefore, whether Crescent breached it or not, there is no unjust enrichment claim. Where "there is a valid contract governing the subject matter of the parties' dispute, recovery in quasi contract, for unjust enrichment, for events arising out of that same subject matter is precluded." *Wilhelmina Artist Mgmt., LLC v. Knowles*, No. 601151/03, 2005 WL 1617178, at *10 (N.Y.Sup. June 6, 2005) (Cahn, J.).

Plaintiff's argument characterizing Crescent's position as asserting that the Agreement was unenforceable and illusory wildly misses the mark. Pl. Br. 24-25. Crescent nowhere argues that that the Agreement was illusory and unenforceable. Quite the opposite, the Agreement was valid and binding. Both parties were limited in their rights pursuant to it: The Agreement requires Crescent to "use the New Trump Mark as the *sole* identification of the Building during the term." Agmt. § 1(b) (emphasis added). Thus, from the moment of signing, there was an immediately enforceable mutual obligation: Crescent was required to use Trump's name on the project and was foreclosed from contracting with other potential licensors, and Trump was limited in its right to contract with potential licensees. At the same time, the parties recognized that the project (on land Crescent did not even fully own) might never happen. *Id.* § 8(h). This hardly makes the Agreement illusory or invalid.

Not only is the License Agreement valid, it also covers the exact same "subject matter" as plaintiff's unjust enrichment claim. Plaintiff does not dispute this obvious point; instead it resorts to the argument that the Agreement was illusory. But, as described above, this was an enforceable License Agreement that was solely the source of Trump's relationship to the Tel Aviv property. In other words, plaintiff's relationship to this property arose only because of the Agreement. Absent the Agreement, Trump has no relationship to the property at all. Therefore, whatever claims Trump could possibly have concerning this property arise *only* as a result of the Agreement itself. An unjust enrichment claim must be dismissed under such circumstances.

D. THE "INDEMNIFICATION" CLAIM SHOULD BE DISMISSED

Plaintiff does not dispute that where there is no breach, there can be no indemnification claim. Because there was no breach, *see* § I(A), *supra*, the indemnification

claim must be dismissed. Second, the indemnification clause is not a fee-shifting provision; it only applies to third-party suits against Trump. Had the parties desired a fee-shifting provision, they could have written one (*e.g.*, "In the event Trump prevails in a litigation against Crescent for breach of the Agreement, Trump shall be entitled to its reasonable attorneys' fees and costs."). But there is no such provision to be found in this Agreement.

Plaintiff's claim is the very claim rejected in *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492-93 (1989), yet another controlling Court of Appeals case cited in the opening brief which plaintiff fails to cite or distinguish. Indemnification provisions are "strictly construed to avoid reading into it a duty which the parties did not intend to be assumed," because an indemnification for litigation fees is "contrary to the well-understood rule that parties are responsible for their own attorney's fees." *Id.* at 491-92. To make use of an indemnification clause in such circumstances, a plaintiff must demonstrate that the indemnification provision was "unmistakably clear" that it covered indemnification in breach of contract actions, rather than indemnification relating to third-party claims. *Id.* at 492. Unmistakably clear? Here, if plaintiff is correct, Crescent must not only "indemnify" Trump for claims against itself, but "defend" Trump in a case against itself. Under plaintiff's absurd reading, Crescent must hire lawyers to sue itself.

The indemnification claim is frivolous. Crescent's motion should be granted.[9]

E. CLAIMS FIVE THROUGH EIGHT SHOULD BE DISMISSED

Crescent adopts all of the arguments as to claims five through eight asserted by counsel for the individual defendants in their moving and reply briefs, which are hereby

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[9] In *CSI Investment Partners II, L.P. v. Cendant Corp.*, 507 F.Supp.2d 384 (S.D.N.Y. 2007), the only case cited by plaintiff, defendant did not even *argue* that the clause applied only to third parties. Its only argument was that it did not breach. *Id.* at 423. Here, in contrast, it is plain that the indemnification clause applies only to third parties. At a minimum, it is not "unmistakably clear" that the indemnification clause, which is to be "strictly construed," is actually a fee-shifting provision in disguise. *Hooper*, 74 N.Y.2d at 491-92.

incorporated by reference. These claims should be dismissed.

II. PLAINTIFF'S CPLR 3212 "CROSS-MOTION" IS PROCEDURALLY DEFICIENT

Plaintiff appears to cross-move for summary judgment pursuant to CPLR 3212. This motion fails as a matter of law. A party may not move for summary judgment pursuant to CPLR 3212 until "after issue has been joined." CPLR 3212(a). Issue has not been joined. The cross-motion, to the extent it is brought under CPLR 3212, should be denied.

III. PLAINTIFF'S CPLR 3211(c) MOTION SHOULD BE DENIED

Plaintiff also invites the Court, after argument on the motion to dismiss, and after notice to the parties, to convert the motion to a summary judgment motion after requesting that the parties submit affidavits. CPLR 3211(c). The invitation should be rejected. At this stage, before there has been any discovery at all, the Court could not possibly grant summary judgment to plaintiff. If the Court were not to grant the motion to dismiss, defendants would be entitled to take discovery from plaintiff, develop any affirmative defenses, and possibly counterclaim.

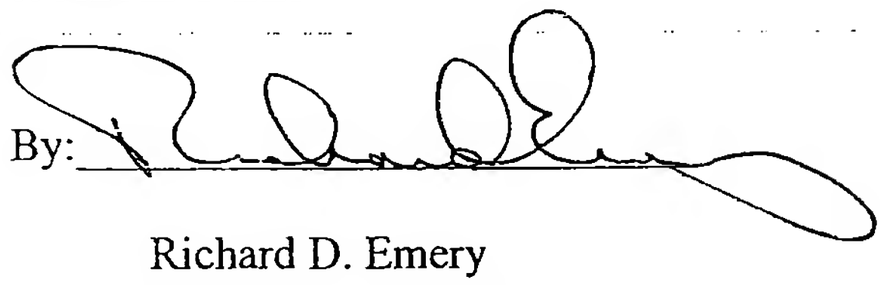
Plaintiff's 3211(c) motion should be seen for what it is: an excuse to introduce factual material outside the Complaint into the motion to dismiss record. That is its only purpose. Though this case is young, plaintiff already has a rich history of introducing improper material (including even a settlement document now subject to a *sub judice* motion to strike) in the hope that some extraneous document might persuade the Court that the Complaint, which on its own cannot withstand a motion to dismiss, somehow survives. But the improper material should be ignored, and the motion to dismiss should be granted.

CONCLUSION

For all of the foregoing reasons, all of the claims in the Complaint against Crescent Heights Diamond LLC should be dismissed in their entirety.

Dated: September 16, 2008
New York, New York

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: 

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-----Original Message-----
From: Russell Galbut <rgalbut@CrescentHeights.com>
To: Ivanka Trump
CC: Sonny Kahn <skahn@CrescentHeights.com>; Bruce Menin <bmenin@crescentheights.com>
Sent: Thu Apr 10 13:29:23 2008
Subject: Thanks

Ivanka,

Thanks for all. Especially for looking after Keith Menin. As I said he is like my son and he is Bruce's nephew.

We spoke with Donald and everything is fine.

He gave us his word that he would not do another deal in Tel Aviv without first speaking with us and none of us feel we need it in writing.

With that said we need a simple document for our accounting and tax people that says we are done on this issue.

Can you please mark up the document in any way that you want and send it today to Fran in our office so that we can finish and wire you all the money tomorrow.

All the best and safe travels in the coming week.

Russell W. Galbut

Managing Principal
Crescent Heights of America

Winner of the 2006, Freddie Mac
"Multifamily Development Firm of the Year" Award National Association of Homebuilders

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rgalbut@crescentheights.com

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-----Original Message-----
From: Ivanka Trump [mailto:itrump@trumporg.com]
Sent: Wednesday, April 09, 2008 11:50 AM
To: Russell Galbut
Subject: RE: Fran should be sending out document tonight.

Hello Russell,
I have received the document and will review it this afternoon.
Thank you for your prompt attention.
Also, regarding Keith and Jenny, I have spoken to both my father and Carmen, the events coordinator at Mar-a-lago, and they will definitely be given special attention.
Best,
Ivanka

-----Original Message-----
From: Russell Galbut [mailto:rgalbut@CrescentHeights.com]
Sent: Tuesday, April 08, 2008 11:16 PM
To: Ivanka Trump; ivankamtrump@hotmail.com
Cc: Frances Schreiber
Subject: Fran should be sending out document tonight.

Ivanka,

I asked Fran to send the document tonight to all parties to review simultaneously.

She is finishing it up now and should be out shortly.

Nice talking to you today.

Please do not forget to remind your Dad about the wedding for Keith Menin and Jenny Halegua on January 17th of this coming year.

All the best.

Russell W. Galbut

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October 1, 2008

By Hand-Delivery

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

Your Honor:

We represent defendant Crescent Heights Diamond, LLC ("Crescent"), in the above action. We are in receipt of plaintiff Trump Marks LLC's order to show cause seeking leave to file a sur-reply to Crescent's motion to dismiss. This request comes after the case has been fully submitted and after this Court has heard oral argument on the pending motions. Additionally, in seeking permission to file a sur-reply, plaintiff has also improperly submitted the sur-reply itself. Plaintiff's request is improper and Crescent respectfully asks this Court to deny plaintiff's order to show cause.

This is yet another attempt by plaintiff's counsel to pollute the record. On September 25, 2008, this Court granted Crescent's motion to strike, and held that plaintiff inappropriately submitted a confidential settlement document. This Court has further recognized the importance of insulating the record from any evidence outside the Complaint and the License Agreement, and therefore held that all discovery disputes will be referred to a referee while the motion to dismiss is pending.

Plaintiff's request for permission to file a sur-reply improperly includes the sur-reply itself. Commercial Part Rule 18 provides that parties "are not permitted" to file sur-reply papers "[a]bsent express permission in advance." Yet plaintiff's request for permission includes the very document that it is not yet permitted to submit: the Supplemental Affirmation of Stephen B. Meister, dated October 1, 2008, attaching numerous exhibits. This is improper and, if plaintiff's Order to Show Cause is granted, Crescent will move to strike this Affirmation.

EMERY CELLI BRINCKERHOFF & ABADY LLP

Moreover, a sur-reply is inappropriate at this late stage. Plaintiff had an opportunity to respond to Crescent's motion to dismiss, and did so on August 22, 2008. Crescent's reply was submitted on September 16, 2008. The Court then heard oral argument on September 25, 2008. Now, after this Court has already heard oral argument on the pending motions, and over two weeks after defendant's reply papers were submitted, plaintiff seeks permission to file a sur-reply. This is improper. Furthermore, if plaintiff is granted permission to file its sur-reply, Crescent will need to respond to its arguments and would seek permission to file a sur-sur-reply, with no end in sight.

Additionally, this is a motion to dismiss. Documents outside the Complaint and its attachments are improper for consideration on a motion to dismiss. In the main, plaintiff seeks a sur-reply to introduce extraneous evidence (an email from long after the underlying contract was signed). This extraneous evidence is plainly inappropriate to oppose a motion to dismiss, and is instead submitted in the hope that it might persuade the Court that the Complaint, which on its own cannot withstand the motion to dismiss, somehow survives. Plaintiff's attempt to again submit improper evidence should be denied.

Plaintiff also seeks to use a sur-reply to further respond to a New York Court of Appeals case that supports Crescent's motion to dismiss, *Long Island R.R. Co. v. Northville*, 41 N.Y.2d 455, 461 (1977). Yet Crescent pointed to this case its opening papers and plaintiff attempted to distinguish *Northville* in its response. It cannot get two bites at this same apple.

Plaintiff further seeks a sur-reply to point out an error in Crescent's brief. No sur-reply is needed for this point. Counsel for Crescent apologizes for inadvertently citing the dissent in *Coley v. Cohen*, 289 N.Y. 365, 373-74 (1942), which considered a heading in interpreting a contract. Yet, the *Coley* majority did not disagree with the dissent's approach of looking to the contract's heading; it only reached a different conclusion when considering the contract as a whole, as Crescent has urged this Court to do. Furthermore, two appellate courts have held that headings can be considered in interpreting contracts, as Crescent argued in its brief. *See* Crescent Reply Br. at 7.

If this Court is inclined to grant plaintiff's Order to Show Cause, Crescent requests that this Court give counsel an opportunity to appear before the Court and explain why plaintiff's sur-reply is improper.

Respectfully Submitted,

Richard D. Emery
Ilann Maazel

C: Stephen Meister
Y. David Scharf

EMERY CELLI BRINCKERHOFF & ABADY LLP
Attorneys at Law
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Tel: (212) 763-5000
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DATE: October 2, 2008

FROM: Debbie Greenberger

TO: Chambers of Justice Cahn

FACSIMILE #: 212-748-7793

RE: Enclosed find a copy of the letter sent this morning by messenger.

TOTAL NUMBER OF PAGES INCLUDING COVER SHEET:

MESSAGE:

IF THERE IS ANY PROBLEM WITH THIS TRANSMISSION,
PLEASE CALL AS SOON AS POSSIBLE
(212) 763-5000

RICHARD D. EMERY
ANDREW G. CELLI, JR.
MATTHEW D. BRINCKERHOFF
JONATHAN S. ABADY
ILANN M. MAAZEL
ERIC HECKER
MARIANN MEIER WANG
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October 7, 2008

By Hand-Delivery

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

Your Honor:

We represent defendant Crescent Heights Diamond, LLC ("Crescent") in the above action and write to follow-up on today's oral argument. At today's argument Your Honor denied plaintiff's application to file a sur-reply to Crescent's motion to dismiss. Your Honor further stated that, to the extent plaintiff's sur-reply sought to supplement the record with an email between the parties, that email could not be admitted if it was in the context of settlement negotiations. As Crescent's counsel indicated at oral argument, that email is an inadmissible settlement document, though plaintiff disagrees. We therefore request that Your Honor refer the question of the admissibility of this confidential settlement document to a referee, as the Court suggested today.

We also note that plaintiff's submission of an email is inappropriate in a sur-reply opposing a motion to dismiss as it is outside the Complaint, its attachments and the License Agreement — the only documents appropriate for consideration on a motion to dismiss. Nonetheless, we respectfully request that a referee determine whether the document reflects confidential settlement discussions.

Respectfully submitted,

Richard D. Emery

C: Stephen Meister
Y. David Scharf

MEISTER SEELIG & FEIN LLP

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140 East 45th Street, 19th Floor
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Stephen B. Meister
Partner
Direct (212) 655-3551
Fax (646) 539-3651
sbm@msf-law.com

October 10, 2008

Via Hand Delivery

The Honorable Herman S. Cahn, J.S.C.
Supreme Court of the State of New York
New York County
60 Center Street
Room 615
New York, NY 10007

Re: ***Trump Marks LLC v. Crescent Heights Diamond, LLC et al.,***
New York County Index No: 601372/2008

Dear Justice Cahn:

On October 8th, we as counsel to Plaintiff received a copy of a letter hand delivered to Your Honor on October 7, 2008[1] from counsel for Defendant Crescent Heights, Richard Emery, concerning Plaintiff's proposed surreply sought to be filed in motion sequence 002 (Crescent's motion to dismiss). At the October 7th oral argument,[2] Plaintiff explained that, in its initial moving papers, Crescent contended that the subject License Agreement survived the sale of the development site by Crescent in January 2008—because, according to Crescent, the License Agreement contained no obligation to build—subject to Plaintiff's right—which Crescent contended was Plaintiff's sole remedy—to terminate the License Agreement in the event of Crescent's failure to commence construction, but only after the second anniversary of the License Agreement (License Agreement § 8(h)); that, in response, Plaintiff contended in its opposition papers that such a reading of the License Agreement yielded an unintended, unfair, and one-sided result, in that, were the License Agreement so construed, Plaintiff's negative covenant requiring Plaintiff not to license the Trump name in Tel Aviv for a 3 ½ year period, would continue in full force and effect beyond the sale of the project site, despite Plaintiff never being able (according to Crescent) to receive any royalties whatsoever; and that once Crescent was apprised of the untenable nature of its position, Crescent, for the first time in its reply papers, reversed its position and contended instead that the License Agreement had terminated in January 2008

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[1] As a result of receiving Atttorney Emery's letter a day late (and its being efiled a day late as well), I was unable to respond until after Yom Kippur.

[2] Attorney Emery did not attend the October 7th oral argument.

when Crescent sold the project site, because, according to Crescent, after such sale, the project site would "no longer" be known by the Trump name (License Agreement § 6(ii)).

At the September 25, 2008 oral argument (on Crescent's motion to dismiss), I was unable to respond to Crescent's sudden change in position in its reply papers, as I had planned, by pointing to a contradictory provision of Crescent's proposed second amendment to the License Agreement, because Your Honor that day granted from the bench Crescent's motion to strike Crescent's proposed second amendment finding that it was an offer of compromise under CPLR 4547. Accordingly, Plaintiff now seeks instead to submit an April 10, 2008 email from Russell Galbut, one of defendant's principals, to Ivanka Trump, which Plaintiff contends likewise contradicts Crescent's newly concocted position on reply.

Initially, by letter dated October 1, 2008, Attorney Emery objected to the proffered April 10th email stating only that "[d]ocuments outside the complaint are improper for consideration on a motion to dismiss." Noticeably absent from Attorney Emery's October 1st letter was any allegation that the April 10th email was an inadmissible offer of settlement, or any statement disputing plaintiff's contention that defendant had improperly submitted new arguments in its reply papers.[3]

Attorney Emery's October 1st letter notwithstanding, Crescent, at the October 7th oral argument, asserted for the first time that the proffered April 10th email was an inadmissible settlement offer. Attorney Emery's revisionist history notwithstanding, the Court acknowledged the propriety of admitting the April 10th email, but ordered that the matter of its admissibility as of matter of law be tried before a referee (unless Crescent, as the Court suggested, simply waived its objection to the admission of the April 10th email). By his letter of October 7th, Attorney Emery, in a desperate bid to shield from the Court's eyes admissions by his own clients directly contradicting his fabrications on reply, has rejected the Court's practical suggestion thereby forcing the parties and the Court to conduct an unnecessary hearing to determine the admissibility of an email from one party to another, not marked privileged or confidential, not containing the words "settlement" or "compromise" or "offer" anywhere therein, not mentioning any dispute whatsoever, and not characterized by Attorney Emery as an inadmissible settlement offer in his initial letter objecting to the very same email.

Your Honor never said, as Attorney Emery asserts in his October 7th letter, that the April 10th email would not be admitted if it was sent "in the context of settlement negotiations." CPLR 4547 specifically bars "offers of compromise" and specifically provides that the

---

[3] Crescent's reply plainly violates Commercial Division Rule 17(ii), which mandates that "reply memoranda...shall not contain any arguments that do not respond or relate to those made in the memoranda in chief." Attorney Emery in his October 1st letter also conceded that he had improperly misled the Court by citing to statements contained in the opinion of a lone dissenter, while representing them to be the holding of the Court of Appeals in *Coley v. Cohen*, 289 N.Y. 365, 373-74 (1942), yet another reason why the surreply was made necessary by defendant's improper reply.

"provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations," (emphasis supplied). Thus, courts interpreting CPLR 4547 have uniformly refused to exclude letters and emails which do not themselves constitute offers to compromise. *See Java Enter., Inc. v. Loeb, Block & Partners LLP*, 48 A.D.3d 383, 384 (1st Dep't 2008) (defendant's admission of liability in an email is not inadmissible under CPLR 4547, "which applies only to offers 'to compromise a claim which is disputed'"); *Dubose v. Anton Partners, Inc.*, 2004 WL 1000422, at *1 (1st Dep't 2004) ("[t]he 'separation letter'...signed by defendant, acknowledging the debt to plaintiff...did not constitute a compromise offer (CPLR 4547) and was properly admitted"); *Alternatives Fed. Credit Union v. Olbios, LLC*, 14 A.D.3d 779, 781 (3d Dep't 2005) ("the letters were not offers to settle or compromise any claim and, with respect to the issue of liability, they represent predispute communications which are outside the scope of CPLR 4547").

Attorney Emery's backhanded attempt to lull the Court into fashioning an improperly framed order of reference in violation of CPLR 4547 (by incorrectly suggesting the Court has already said it would do so), should not be countenanced. The order of reference, it is respectfully submitted, should simply order the referee to hear and determine (or report, at the Court's pleasure) on the April 10th email's admissibility under applicable law, and of course stay determination of Crescent's motion to dismiss until this matter is resolved.

Respectfully Submitted,

Stephen B. Meister

cc: Richard Emery, Esq.
Y. David Scharf, Esq.
Mary Flynn, Esq.
Debra Greenberger, Esq.

RICHARD D. EMERY
ANDREW G. CELLI, JR.
MATTHEW D. BRINCKERHOFF
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October 10, 2008

By Hand-Delivery and Electronic Filing

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

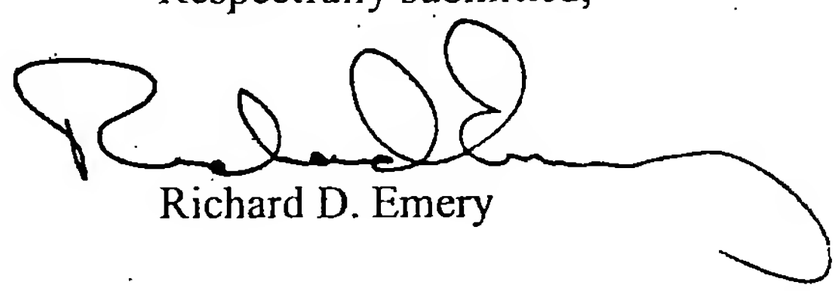
Your Honor:

We represent defendant Crescent Heights Diamond, LLC ("Crescent") in the above action and write to respond to a letter from plaintiff's counsel, Stephen Meister, of today's date. In the main both parties agree that the question of whether the April 10, 2008 email is inadmissible pursuant to CPLR 4547 because it is a settlement document is a question for the referee and both parties consent to a referral for that purpose. This email was plainly sent after the dispute in this case arose and was sent as part of an offer of compromise, as we will demonstrate to the referee. The referee should take evidence as to the purpose and context of this email.

More importantly, plaintiff takes the curious position at the end of its letter that this Court should stay determination of Crescent's motion to dismiss until this matter is resolved. Plaintiff is wrong. No stay should issue as this email is relevant only to plaintiff's cross-motion for summary judgment, and not Crescent's motion to dismiss. Plaintiff seeks to put into the record an email that was not included in its Complaint (nor even mentioned in the Complaint), not part of the License Agreement, and not attached to the Complaint. Documents outside the Complaint and its attachments are improper for consideration on a motion to dismiss. There is therefore no reason to stay resolution of the motion to dismiss. The purpose of the referral is to determine whether plaintiff can place this email into the record for the purpose of its cross-motions for summary judgment under CPLR 3212 and 3211(c) (which are, in any event, procedurally deficient, as Crescent explained in its reply brief).

Plaintiff therefore requests that Your Honor not stay resolution of Crescent's fully-briefed, *sub judice,* motion to dismiss while the email's admissibility is determined.

Respectfully submitted,



Richard D. Emery

C: Stephen Meister
Y. David Scharf

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ANDREW G. CELLI, JR.
MATTHEW D. BRINCKERHOFF
JONATHAN S. ABADY
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November 10, 2008

By Hand-Delivery and Electronic Filing

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

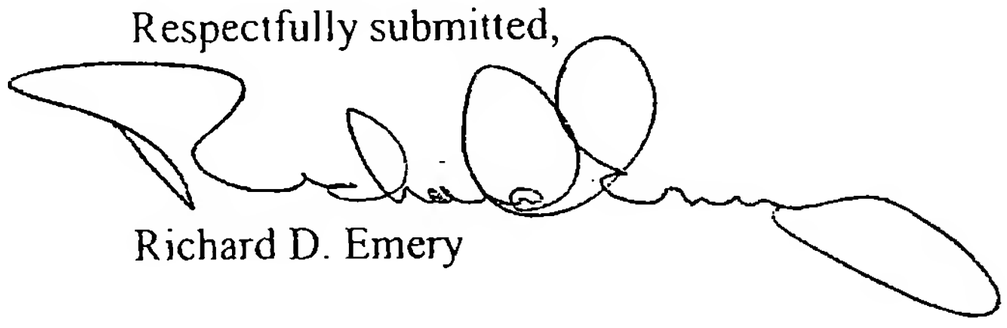
Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

Your Honor:

We represent defendant Crescent Heights Diamond, LLC ("Crescent") in the above action. As per Your Honor's suggestion, the parties today attempted to mediate the pending action before the Honorable Steven G. Crane. That mediation has failed. We see no reasonable prospect for settlement until Your Honor rules on the pending motions to dismiss. We therefore respectfully request that the Court rules on those motions at its earliest convenience.

As we previously notified Your Honor, Crescent is willing to stipulate to have Your Honor serve as a JHO on this matter when your term expires and asks Your Honor to query plaintiff's counsel as to whether plaintiff will similarly stipulate.

Respectfully submitted,



Richard D. Emery

C: Stephen Meister
Y. David Scharf
Hon. Steven G. Crane

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November 12, 2008

Via Hand Delivery &
Electronic Filing
Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 615
New York, NY 10007

Re: ***Trump Marks LLC v. Crescent Heights Diamond LLC, et al.***
Index No. 601372/2008

Dear Justice Cahn:

This firm represents Plaintiff Trump Marks LLC ("Plaintiff") in the above-captioned action and we write this letter in response to the letter that was hand delivered to Your Honor on November 10, 2008 by Attorney Emery, counsel to defendant Crescent Heights Diamond LLC ("Crescent").

Unfortunately, as Attorney Emery's letter states, the November 10th mediation, which was scheduled at Your Honor's direction, before the Honorable Steven G. Crane, did not bear fruit. Whether or not, as Attorney Emery contends, there is no reasonable prospect for settlement until Your Honor rules on the pending motions to dismiss (motion sequence numbers 001 and 002), Plaintiff likewise seeks a prompt disposition of the pending motions to dismiss. In that regard, however, Plaintiff respectfully submits that the motions to dismiss (sequence numbers 001 and 002) cannot be decided by the Court until a referee's hearing previously ordered by the Court is held and the referee's report or determination thereon is issued.

In this regard, Plaintiff respectfully reminds Your Honor that shortly after Your Honor had oral argument on the motions to dismiss (sequence numbers 001 and 002), Plaintiff filed a motion (motion sequence number 006) seeking leave to file, in motion sequence number 002, a supplemental affirmation ("Supplemental Affirmation") in response to

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CALIFORNIA: Chassman & Seelig LLP; 350 South Figueroa Street, Suite 420; Los Angeles, CA 90071 Tele.(213)626-6700

certain new arguments and documentary evidence improperly raised for the first time in Crescent's reply on the motion to dismiss, sequence number 002.[1]

At the October 7th oral argument on motion sequence number 006, attended by Attorney Emery's associate, Debra Greenberger, but not by Attorney Emery, Plaintiff explained to the Court that the Supplemental Affirmation was necessary because, in its initial moving papers, Crescent contended that the subject License Agreement survived the sale of the project site by Crescent in January 2008—because, according to Crescent, the License Agreement contained no obligation on the part of Defendant Crescent to build—subject to Plaintiff's right—which Crescent contended was Plaintiff's sole remedy—to terminate the License Agreement in the event of Crescent's failure to commence construction, but only after the second anniversary of the License Agreement (License Agreement § 8(h)); that, in response, Plaintiff contended in its opposition papers that such a reading of the License Agreement yielded an unintended, unfair, and one-sided result, in that, were the License Agreement so construed, Plaintiff's negative covenant requiring Plaintiff not to license the Trump name in Tel Aviv for a 3 ½ year period, would continue in full force and effect beyond the sale of the project site, despite Plaintiff never being able (according to Crescent) to receive any royalties whatsoever; and that once Crescent was apprised of the untenable nature of its position, Crescent, for the first time in its reply papers, reversed its position and contended instead that the License Agreement had terminated in January 2008 when Crescent sold the project site, because, according to Crescent, after such sale, the project site would "no longer" be known by the Trump name (License Agreement § 6(ii)).

At the October 7th oral argument on motion sequence number 006, I explained to Your Honor that I had intended on referring the Court to a proposed (unsigned) second amendment to the License Agreement drafted by Crescent because it contained a statement contrary to the new and revised position improperly asserted by Crescent for the first time in its reply papers. I further advised Your Honor, however, that as a result of Your Honor granting from the bench, during the September 25th oral argument on motion sequence numbers 001 and 002, Crescent's motion to strike Crescent's proposed second amendment (as an offer of compromise under CPLR 4547), Plaintiff was seeking leave of Court (via motion sequence number 006) to submit an April 10, 2008 email from Russell Galbut, one of defendant's principals, to Ivanka Trump (the "April 10th Email"), which Plaintiff contends likewise contradicts Crescent's newly concocted position on reply, and which is not identified as a privileged settlement document.

At the October 7th argument on motion sequence number 006, the Court requested that Crescent's counsel simply waive its objection to the admission of the April 10th Email, given that, unlike the proposed second amendment, the April 10th Email was not marked as confidential and did not mention any settlement or compromise. Crescent indicated that it would take the Court's request under advisement, whereupon Your Honor stated

---

[1] A copy of the executed Order to Show Cause for motion sequence number 006 is attached hereto as **Exhibit A** for the Court's convenience.

that, absent Crescent's consent to the admission of the April 10, 2008 email, the matter of the admissibility of the April 10th email, as of matter of law, would have to be tried before a referee. Later that same day, Crescent's counsel hand delivered a letter to Your Honor, in which Crescent rejected Your Honor's practical suggestion, and requested that Your Honor refer the question the admissibility of the April 10th Email to a referee.[2]

Thus, it is respectfully submitted that a formal order of reference should be issued in response to motion sequence number 006, which should simply order a referee to hear and determine (or report, at the Court's pleasure) on the April 10th email's admissibility under applicable law, and of course stay determination of Crescent's motion to dismiss (motion sequence number 002) pending the determination of the issue of the admissibility of the April 10th Email. Plaintiff also believes that the other motion to dismiss, made by the individual defendants (motion sequence number 001), should likewise be stayed until the admissibility issue is determined, since the issues raised in the two motions to dismiss are inextricably intertwined.

Respectfully Submitted,

Stephen B. Meister

SBM/tmg
Encl.

cc: Richard Emery, Esq.
Y. David Scharf, Esq.
Mary Flynn, Esq.
Debra Greenberger, Esq.

[2] A copy of Mr. Emery's October 7, 2008 letter is attached hereto as **Exhibit B**.

EXHIBIT A

SUPREME COURT
STATE OF NEW YORK

APPROVED

COMMERCIAL DIVISION
SUPPORT OFFICE

☑ MOT ☐ X-MOT

PRESENT: Hon. Herman Cahn

CLERK'S INITIALS

Justice.

023157

At IAS Part 49 of the Supreme Court, of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, New York, New York on 2 day of October, 2008

MOTION SEQUENCE #006

TRUMP MARKS LLC,

Plaintiff,

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

Index No.: 601372/08

(Cahn, J.)

ORDER TO SHOW CAUSE

INDEX NUMBER 601372 YEAR 2008
15 MOTIONS 45.00
TOTAL 45.00
CHECK 45.00

CDMS CASHIER DATE TIME TERM
29945 1000 08 OCT 02 11:48 AM 61-3

Upon the annexed Affirmation of Stephen B. Meister, dated October 1, 2008, the exhibits attached thereto, the annexed Affirmation of Urgency of Stephen B. Meister, dated October 1, 2008, and all the prior pleadings, papers and proceedings heretofore had herein and for sufficient cause having been shown, it is hereby:

ORDERED, that the defendants or their attorneys show cause before this Court at IAS Part 49, Room 232 on the 7 day of October 2008, at 2 00 ~~a.m.~~/p.m., or as soon thereafter as counsel can be heard, why an Order should not be made and entered, pursuant to CPLR 2214(c), granting Plaintiff permission to submit a brief surreply affirmation, attaching evidence responding to the brand new evidence and arguments improperly first presented in

Defendant Crescent Heights Diamond LLC's reply papers on its Motion to Dismiss (Motion Sequence #002); and given that the Court on September 25, 2008 granted Defendant's motion to strike;

NC / JSC

ORDERED, that ~~overnight delivery~~ overnight delivery or hand delivery of a copy of this Order, together with all of the papers upon which it is granted, upon defendant Crescent Heights Diamond LLC's counsel, Richard D. Emery, Emery Celli Brinckerhoff & Abady LLP, 75 Rockefeller Plaza, New York, New York 10019, and Y. David Scharf, Morrison Cohen LLP, 909 Third Avenue, New York, New York 10022, counsel to defendants Sonny Kahn, Russell Galbut and Bruce Menin, on or before the 2 day of October, 2008 shall be deemed good and sufficient service;

~~**ORDERED**, the answering papers, if any, shall be served upon counsel for the movant by overnight delivery or hand delivery on or before the ____ day of _____, 2008; and it is further;~~

NC / JSC

~~**ORDERED**, the reply papers, shall be served upon the aforementioned counsel for the defendants by overnight delivery or hand delivery on or before the _____ day of _____, 2008.~~

NO PREVIOUS APPLICATION HAS BEEN MADE FOR THE RELIEF REQUESTED HEREIN. C.C. (INITIAL)

ENTER:

J.S.C. J.S.C.

ORAL ARGUMENT DIRECTED

J.S.C.

EXHIBIT B

RICHARD D. EMERY
ANDREW G. CELLI, JR.
MATTHEW D. BRINCKERHOFF
JONATHAN S. ABADY
ILANN M. MAAZEL
ERIC HECKER
MARIANN MEIER WANG
SARAH NETBURN
KATHERINE ROSENFELD
O. ANDREW F. WILSON
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October 7, 2008

By Hand-Delivery

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

Your Honor:

We represent defendant Crescent Heights Diamond, LLC ("Crescent") in the above action and write to follow-up on today's oral argument. At today's argument Your Honor denied plaintiff's application to file a sur-reply to Crescent's motion to dismiss. Your Honor further stated that, to the extent plaintiff's sur-reply sought to supplement the record with an email between the parties, that email could not be admitted if it was in the context of settlement negotiations. As Crescent's counsel indicated at oral argument, that email is an inadmissible settlement document, though plaintiff disagrees. We therefore request that Your Honor refer the question of the admissibility of this confidential settlement document to a referee, as the Court suggested today.

We also note that plaintiff's submission of an email is inappropriate in a sur-reply opposing a motion to dismiss as it is outside the Complaint, its attachments and the License Agreement — the only documents appropriate for consideration on a motion to dismiss. Nonetheless, we respectfully request that a referee determine whether the document reflects confidential settlement discussions.

Respectfully submitted,

Richard D. Emery

C: Stephen Meister
Y. David Scharf

RICHARD D. EMERY
ANDREW G. CELLI, JR.
MATTHEW D. BRINCKERHOFF
JONATHAN S. ABADY
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November 13, 2008

By Hand-Delivery and Electronic Filing

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

Your Honor:

We represent defendant Crescent Heights Diamond, LLC in the above action and write to respond to yesterday's letter from plaintiff's counsel, Stephen Meister. This is now the second time that plaintiff has discussed the contents of a settlement document in correspondence with this Court, despite Your Honor's order that plaintiff's submission of a related settlement document was improper and should be stricken from the record, and despite Your Honor's determination that only a referee (and not this Court, given the pending motions) should learn of the contents of the settlement document. Plaintiff should not be permitted to continue to attempt to pollute the record with documents reflecting settlement conversations.

This Court's determination of the *sub judice* motions to dismiss is not affected by the referral to a referee. The admissibility of an email between the parties concerning settlement is irrelevant to disposition of the motions to dismiss. As we stated in our October 10, 2008 letter to this Court (attached) --- which plaintiff conspicuously ignores in its extensive letter describing the history of its attempts to submit confidential settlement documents --- this email is relevant (if at all) only to plaintiff's cross-motion for summary judgment, and *not* the motions to dismiss. The motion to dismiss record only includes the Complaint, the License Agreement, and its attachments.

Plaintiff therefore requests that Your Honor not stay resolution of the fully-briefed, *sub judice,* motions to dismiss while the email's admissibility is determined by a referee. In addition, we renew our request to inquire of Mr. Meister whether his client will agree that Your Honor may act as a JHO in this matter in the event that is Your Honor's status after January 1st.

Respectfully submitted,

Richard D. Emery

Encl.

C: Stephen Meister
Y. David Scharf

Exhibit A

RICHARD D. EMERY
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October 10, 2008

By Hand-Delivery and Electronic Filing

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

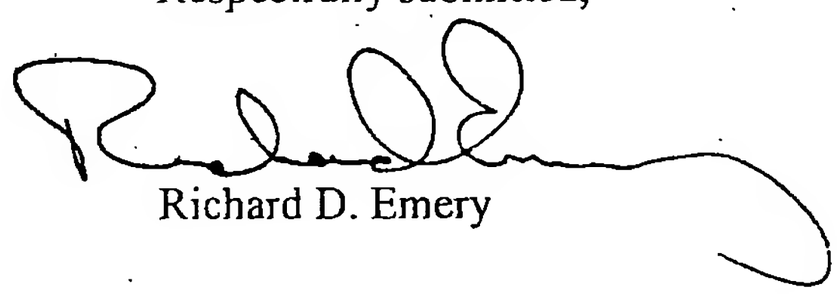
Your Honor:

We represent defendant Crescent Heights Diamond, LLC ("Crescent") in the above action and write to respond to a letter from plaintiff's counsel, Stephen Meister, of today's date. In the main both parties agree that the question of whether the April 10, 2008 email is inadmissible pursuant to CPLR 4547 because it is a settlement document is a question for the referee and both parties consent to a referral for that purpose. This email was plainly sent after the dispute in this case arose and was sent as part of an offer of compromise, as we will demonstrate to the referee. The referee should take evidence as to the purpose and context of this email.

More importantly, plaintiff takes the curious position at the end of its letter that this Court should stay determination of Crescent's motion to dismiss until this matter is resolved. Plaintiff is wrong. No stay should issue as this email is relevant only to plaintiff's cross-motion for summary judgment, and not Crescent's motion to dismiss. Plaintiff seeks to put into the record an email that was not included in its Complaint (nor even mentioned in the Complaint), not part of the License Agreement, and not attached to the Complaint. Documents outside the Complaint and its attachments are improper for consideration on a motion to dismiss. There is therefore no reason to stay resolution of the motion to dismiss. The purpose of the referral is to determine whether plaintiff can place this email into the record for the purpose of its cross-motions for summary judgment under CPLR 3212 and 3211(c) (which are, in any event, procedurally deficient, as Crescent explained in its reply brief).

Plaintiff therefore requests that Your Honor not stay resolution of Crescent's fully-briefed, *sub judice,* motion to dismiss while the email's admissibility is determined.

Respectfully submitted,



Richard D. Emery

C: Stephen Meister
Y. David Scharf

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November 14, 2008

Via Hand Delivery &
Electronic Filing
Honorable Herman S. Cahn, J.S.C.
Supreme Court, New York County
60 Centre Street, Room 615
New York, NY 10007

Re: ***Trump Marks LLC v. Crescent Heights Diamond LLC, et al.***
Index No. 601372/2008

Dear Justice Cahn:

This firm represents Plaintiff Trump Marks LLC ("Plaintiff") in the above-captioned action. We write this letter in response to the letters of November 13, 2008 from Attorney Emery, counsel to defendant Crescent Heights Diamond LLC ("Crescent"), and Attorney Scharf, counsel to the individual defendants, Sonny Kahn, Russell Galbut and Bruce Menin (collectively, the "Individual Defendants").

At the October 7th oral argument on Plaintiff's motion for leave to file the Supplemental Affirmation containing the April 10th email, the Court expressly stated that the April 10th email was relevant to the motions to dismiss and therefore, failing the Defendants' consent to its admission, directed that a referee hear and report on its admissibility. Obviously, since Plaintiff seeks to include the April 10th email in its submissions on motion sequence number 002, Crescent's motion to dismiss, any decision on Crescent's motion to dismiss must be stayed until a determination is made as to the admissibility of the April 10th email. Thus, Attorney Emery's statement that this determination is irrelevant to the disposition of the motions to dismiss is facially erroneous. Attorney Emery's suggestion that the April 10th email only relates to Plaintiff's cross-motion is a non sequiter. Plaintiff's cross-motion for summary judgment is merely the flip side of Crescent's motion to dismiss. Crescent's motion is based on the proposition that the License Agreement does not contain a covenant to build; Plaintiff's cross motion (seeking a conversion under CPLR 3211(c) and 3212) is predicated on the proposition that the License Agreement does contain an obligation to build. Thus, any document

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which is relevant to Plaintiff's cross-motion would perforce be relevant to Crescent's motion.

Finally, since all of the Individual Defendants are expressly indicated to be "principals" under Section 8(g) of the License Agreement, since the allegations of the complaint must for purposes of the Individual Defendants' motion to dismiss be assumed to be true, including the allegation that the Individual Defendants received the $80 million in sale proceeds, and given that the April 10th email was sent by Russell Galbut, one of the Individual Defendants, the motion to dismiss by the Individual Defendants (motion sequence number 001) should similarly be stayed until a determination of the April 10th email's admissibility is made. It simply makes no sense to decide the two motions to dismiss separately, nor to decide either until the admissibility of the April 10, 2008 email is determined.

Respectfully Submitted,

Stephen B. Meister

SBM/tmg
Encl.

cc: Richard Emery, Esq.
Y. David Scharf, Esq.
Mary Flynn, Esq.
Debra Greenberger, Esq.

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December 8, 2008

Via Hand Delivery &
Electronic Filing
Honorable Herman S. Cahn, J.S.C.
Supreme Court, New York County
60 Centre Street, Room 615
New York, NY 10007

Re: ***Trump Marks LLC v. Crescent Heights Diamond LLC, et al. (601372/2008)***

Dear Justice Cahn:

This firm represents Plaintiff Trump Marks LLC ("Plaintiff") in the above-captioned action. On November 25, 2008, the parties were before Your Honor to discuss the status of discovery and the issue of the admissibility of an April 10, 2008 email received by Plaintiffs from Defendants. By Order to Show Cause (motion sequence 006) returnable on October 7, 2008, Plaintiff had sought permission to submit the April 10th email in the presently pending motion to dismiss brought by Defendant Crescent Heights Diamond LLC ("Crescent"), motion sequence 002, on the grounds that the April 10th email contradicted a new argument improperly raised by Defendant for the first time in their reply papers on their motion to dismiss.

In their reply papers on their motion to dismiss (motion sequence 002) Defendant Crescent for the first time contended that the License Agreement had terminated in January 2008 when Crescent sold the project site, because, according to Crescent, after such sale, the project site would "no longer" be known by the Trump name (License Agreement § 6(ii)). Crescent's original argument made in its initial moving papers was that the subject License Agreement survived the sale of the development site by Crescent in January 2008 since the License Agreement, according to Crescent, contained no obligation to build, and Plaintiff's sole remedy, according to Crescent, was to terminate the License Agreement in the event of Crescent's failure to commence construction (but only after the second anniversary of the License Agreement). Based on Plaintiff's opposition (in motion sequence 002) that such a reading of the License Agreement yielded an unintended, unfair, and one-sided result, in that, were the License Agreement so construed, Plaintiff's negative covenant requiring Plaintiff not to license the Trump name in Tel Aviv for a 3 ½ year period, would continue in full force and effect beyond

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the sale of the project site, despite Plaintiff never being able (according to Crescent) to receive any royalties whatsoever, Crescent concocted a new (and contradictory) argument in their reply papers asserting an earlier termination of the License Agreement. The advancement of this new argument for the first time on reply was improper and in all events Plaintiff is entitled to respond thereto at the very least by submitting the April 10th email, which contains powerful admissions contradicting Crescent's new reply based argument.

At the October 7th oral argument on motion sequence number 006, the Court expressly stated that the April 10th email was relevant to the motions to dismiss and requested Crescent to consent to its admission. Because Crescent took the Court's request under advisement, the Court further directed that, failing the Defendants' consent to its admission, a referee must hear and report on the admissibility of the April 10th email. Crescent thereafter declined to consent to the admission of the April 10th email, arguing that it was sent in connection with settlement negotiations. On November 25, 2008, the Court informed the parties that it would be issuing an Order of Reference referring the question of the April 10th email's admissibility and other discovery related issues to Judicial Hearing Officer Beverly Cohen. After the November 25, 2008 appearance, the parties conferred with JHO Cohen and scheduled a conference before Her Honor for December 9, 2008.

It is hereby respectfully requested that the Court issue the Order of Reference it referred to at the November 25th appearance prior to the parties' conference before JHO Cohen on December 9, 2008, and that such order direct an expedited determination of the admissibility of the April 10th email. Since Plaintiff seeks to include the April 10th email in its submissions on motion sequence number 002, Crescent's motion to dismiss, any decision on Crescent's motion to dismiss (and the corresponding motion to dismiss made by the Individual Defendants, motion sequence 001) must be stayed until a determination is made by JHO Cohen as to the admissibility of the April 10th email.

Respectfully Submitted,

Stephen B. Meister

SBM/tmg
Encl.

cc: Richard Emery, Esq.
Y. David Scharf, Esq.
Mary Flynn, Esq.
Debra Greenberger, Esq.

3697-002 doc# 274

RICHARD D. EMERY
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December 8, 2008

By Hand Delivery and Electronic Filing

Hon. Herman Cahn
Supreme Court, New York County
60 Centre Street, Room 232
New York, NY 10007

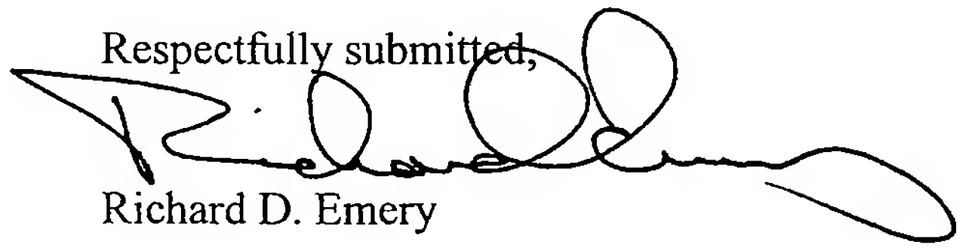
Re: *Trump Marks LLC v. Crescent Heights Diamond, LLC, et al.*,
Index No. 08/601372

Your Honor:

We represent defendant Crescent Heights Diamond, LLC in the above action and write to respond to today's letter from plaintiff's counsel, Stephen Meister, which is entirely duplicative of plaintiff's previous arguments before this Court.

As we have extensively explained in previous letters, a stay is inappropriate. This Court's determination of the *sub judice* motions to dismiss is not affected by the referral to a referee, as the admissibility of an email between the parties is outside the motion to dismiss record (which includes only the Complaint, attachments thereto, and the License Agreement).

Respectfully submitted,



Richard D. Emery

C: Stephen Meister
Y. David Scharf

Cooley Conmen 12-8 w

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Herman Cahn PART 49

Justice

TRUMP MARKS LLC

INDEX NO. 601372/08

MOTION DATE _____

- V -

MOTION SEQ. NO. _____

CRESCENT HEIGHTS DIAMONDS LLC, SONNY KAHN, RUSSELL W. GALBUT, BRUCE A. MEIN, JANE DOES, JOHN DOES

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [ ] Yes [X] No

After consultation with, and approval by the Administrative Judge, Hon. Beverley Cohen is appointed Referee to supervise disclosure herein. The parties are directed to contact the Referee at 646-386-3719 in connection with their discovery disputes.

So ordered.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: November 26, 2008

Herman Cahn
J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn Justice

PART 48m

Trump Marks LLC

INDEX NO. 601372/08

MOTION DATE

-v-

MOTION SEQ. NO. 002

Crescent Heights Diamond

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . .

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/23/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------x

TRUMP MARKS LLC,

Plaintiff,

-against-

Index No. 601372/08

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------x

Herman Cahn, J.:

Motion Sequence Numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order.

Defendants Crescent Heights Diamond, LLC (Crescent), Sonny Kahn, Russell W. Galbut, and Bruce A. Menin move to dismiss the complaint against them (CPLR 3211 [a] [1] and [7]). Plaintiff Trump Marks LLC cross-moves for an order granting it summary judgment on its claims (CPLR 3211 [c] and 3212), and for an order granting it permission to amend to add two new defendants (CPLR 1024).

This action arises from a licensing agreement between plaintiff and defendant Crescent, under which plaintiff licensed to Crescent the right to use the name "Trump Tower" in connection with a condominium building Crescent intended to build in Israel. Crescent failed to build the condo and, instead, sold the land to a third party for a profit. Plaintiff brought this action for breach of contract and unjust enrichment against Crescent. It also asserts claims

against the principals of Crescent, the individual defendants, for violations of the fraudulent conveyances law.

Defendant Crescent seeks dismissal, arguing that the license agreement provides that if it did not build within two years, for any reason within its control, plaintiff's remedy was termination. It argues that, if Crescent used the licensed marks after termination of the agreement, then plaintiff would have the right to damages. Crescent contends that there is no other remedy contemplated in the agreement, and that the Court should reject plaintiff's invitation to rewrite the agreement, made between sophisticated and counseled parties, to create other remedies. Crescent urges that plaintiff was nothing more than a licensor, not a partner in the transaction to develop a building.

The individual defendants, Kahn, Galbut and Menin, urge that the complaint be dismissed against them because they are not, and have never been members of Crescent, a limited liability company, and they did not receive any distribution of the sale proceeds from the sale of the land. Therefore, they argue that they cannot be required to return a conveyance or distribution they did not receive. They also argue that the unjust enrichment claim is barred because there is a written agreement, the license agreement, covering the matter. They urge that the fraudulent conveyance claim also is insufficient because the sale was not a breach of the license agreement, plaintiff failed to plead fraud with particularity and failed to plead the necessary elements of a fraudulent conveyance claim. They further argue that the wrongful distributions claim is insufficient because Crescent's liabilities do not exceed its assets.

BACKGROUND

Plaintiff is a Delaware limited liability company, and is in the business of licensing certain United States trademarks of Donald Trump, covering real estate and related services with the designation "Trump" (Compl, ¶ 2). Defendant Crescent, a Delaware limited liability company, is engaged in the business of building and developing first-class residential condominium properties (*id.*, ¶ 5). The individual defendants, Kahn, Galbut and Menin, are allegedly members of Crescent (*id.*, ¶¶ 6-11).

On May 23, 2006, plaintiff, as licensor, entered into an agreement with defendant Crescent, as licensee, in which plaintiff licensed the Trump name for Crescent's use in connection with the development of a building on land owned or to be acquired by Crescent in Ramat Gan, Israel (Indiv Def Order to Show Cause (OtSC), Ex B). Crescent intended to develop the building as a "first-class, luxury residential condominium" with a retail component; to design, develop, and operate it in the form of condominium ownership; and to market, sell, and/or lease the units in the building, all to be performed in accordance with the "Trump Standard" (therein defined), to maximize the value of the property for the benefit of both the licensor and the licensee (*id.*, at 1). The building to be constructed on the property was going to be the tallest structure in Israel with 786,000 square feet of space. It could not be constructed as a residential and retail development without obtaining variances from the appropriate Israeli authorities (Compl, ¶¶ 14, 27).

Pursuant to the License Agreement, Crescent was licensed to use the name "Trump Tower," or "Trump Plaza," which was then referred to in the agreement as the "New Trump Mark" (*id.*; *see also* OtSC, Ex B, First amend to License Agmt, at 1). It agreed to pay plaintiff

royalties for the rights granted in the agreement (*id.*, § 5 [a], at 9).. Crescent also agreed to design, develop, construct, market, sell, equip, operate, repair and maintain the property with the level of quality and luxury associated with the condominium building known as the Akirov Building in Tel Aviv, Israel, referred to as the Signature Property in the License Agreement (*id.*, § 3 [a]).

In the License Agreement, plaintiff agreed to be subject to a covenant restricting its right to further license its name in the area. Specifically, the License Agreement stated that, "provided the Agreement was in full force and effect," until the first to occur of 42 months from the execution of the agreement, or the date on which 90% of the units are subject to binding contracts of sale, plaintiff would not license the name "Trump" for a residential condominium building within the area of Tel Aviv, Israel, and within 12 months from the date of the agreement, plaintiff would not license the "Trump" name for a "Condominium Hotel" as defined therein (*id.* at 4). Plaintiff agreed to cause Donald J. Trump to make one trip to the Tower Project for no more than one day of six working hours for the promotion of the project to the public (*id.*, § 1 [h]).

Plaintiff was permitted to terminate the agreement for "Trump Standard Defaults," such as Crescent failing, inter alia, to design, develop and maintain the property in accordance with the Trump Standard (*id.*, § 3, at 6-7), and for "non-Trump Standard Defaults" such as Crescent failing to pay money due (*id.*, § 7, at 10). Plaintiff was also permitted to terminate in "addition to any other right or remedy of Licensor" upon 10 days' written notice for reasons such as licensee's bankruptcy, fire damaging or destroying the building, the individual defendants ceasing to own and control the licensee, failure to commence construction within 24 months,

failure of the issuance of certain forms for the commencement of construction, and failure to close with regard to at least 70% of the units within 40 months (*id.*, § 8, at 10-11). The License Agreement provided that, notwithstanding its termination pursuant to any of its terms, plaintiff "shall be entitled to receive, and Licensee shall pay to Licensor all Royalties that have accrued to Licensor prior to the date of termination" (*id.*, § 8 [l], at 11).

The term of the License Agreement commenced upon its execution and "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark, and Licensor and Licensee have not agreed in writing or are not in substantive discussions for the use of a Trump Name as the name of the Tower Project" (*id.*, § 6, at 9).

The parties set forth their agreement with regard to royalties. They provided that an initial non-refundable payment of $1,000,000 was to be made to plaintiff on the date that Crescent is issued the initial construction permit for the commencement of construction. Crescent was further obligated to make royalty payments in connection with a percentage of the average aggregate sales prices per square foot, and a percentage of gross rental payments, of residential units and non-residential areas (*id.*, Ex A, at A-1).

In May 2006, plaintiff registered the licensed mark "Trump Plaza" with the Israeli Trademarks Office (Compl, ¶ 19).

In December 2006, Donald Trump, via a satellite video feed, spoke at the Israeli Business Conference, promoting and associating himself with the land and the Tower Project (*id.*, ¶ 20).

On April 30, 2007, Crescent acquired title to all of the constituent parcels constituting the land at a cost of approximately $44 million (*id.*, ¶ 17).

Crescent, however, asserts that it was unable to procure the necessary approvals to permit the construction of the Tower Property as a purely residential and retail property, as opposed to a mixed-use, residential, retail and office project, from the relevant Israeli authorities (*id.*, ¶ 25).

In or about August 1, 2007, plaintiff became aware that Crescent was negotiating to sell the land to a third party developer (*id.*, ¶ 21). On August 2, 2007, plaintiff notified Crescent that the sale of the land would result in Crescent's default under the License Agreement, causing substantial damage to plaintiff in that it would not receive royalties, its reputation would be damaged and Crescent would be unjustly enriched (*id.*, ¶ 22).

In January 2008, Crescent sold the land to Azorim Investment, Development and Construction Ltd. for approximately $80.2 million (*id.*, ¶¶ 23-24).

Plaintiff alleges that the sale was in breach of the License Agreement. It contends that section 3(a) of the License Agreement imposed an unqualified obligation on Crescent to design and construct the Tower Property. It argues that Crescent's obligations were not excused because it was unable to obtain the necessary approvals to build the Tower Property as envisaged (*id.*, ¶¶ 25-28). Plaintiff asserts that Crescent knew that it had to obtain permits, approvals, and/or variances from the authorities when it signed the License Agreement, and it failed to make bona fide efforts to obtain them (*id.*, ¶¶ 28, 31).

In the complaint, plaintiff asserts eight causes of action. The first three are against Crescent only for breach of the License Agreement; breach of the implied covenant of good faith and fair dealing by selling the land, and depriving plaintiff of the benefit of the License Agreement; and contractual indemnification for losses, attorneys' fees and disbursements in bringing this action. The remaining five causes of action are asserted against all the defendants.

The fourth is for unjust enrichment, claiming that the sale of the land resulted in a windfall profit for defendants which was realized by virtue of "the world renowned reputation of Donald J. Trump as the preeminent developer of luxury residential properties," and that defendants must make restitution to plaintiff of that windfall profit. The fifth and sixth are for fraudulent conveyances under the Debtor and Creditor Law §§ 273-276, and the seventh seeks attorneys' fees under Debtor and Creditor Law § 276-a. Finally, the eighth seeks recovery of the wrongful distribution of the net proceeds of the sale to the members of Crescent, in violation of New York Limited Liability Company Act § 508 or of section 18-607 of the Delaware Limited Liability Company Act.

In moving to dismiss, Crescent asserts that it did not construct the building, the required variances were not granted, no permit to construct the building was issued and the project never went forward to the final plans and specifications stage. Crescent argues that the License Agreement provides that if it did not build within two years for any reason within Crescent's control, plaintiff's only remedy was termination of the License Agreement and revocation of the license. With regard to royalties, Crescent asserts that it agreed to pay $1,000,000 to plaintiff if and when a construction permit were issued. It also agreed to pay additional royalties, if any, when any units in the building were sold, and provided they sold for more than a minimum price per square foot. None of these events occurred, so, Crescent argues, no royalties are due. Crescent contends that although the License Agreement could have provided for an initial, non-refundable payment upon signing, it did not. It also did not include any form of penalty or liquidated damages if the building was not built, nor did it include any clause which would provide plaintiff with a percentage of the profit if the land were resold. Crescent argues that

these provisions should not be read into the agreement, particularly where both parties are sophisticated and counseled. It urges that this was a non-exclusive licensing agreement which placed minimal restrictions on plaintiff's ability to exploit its mark worldwide.

Crescent also contends that the breach of the implied covenant claim is insufficient because it is redundant of the breach of contract claim. The indemnification claims fails because it depends upon a breach or default which Crescent asserts does not exist and because that provision refers to claims by third parties, not a breach of contract claim between Crescent and plaintiff. Crescent urges that the unjust enrichment claim fails because there is a contract that governs the subject matter of the parties' dispute. Crescent further urges that the remaining three claims for fraudulent conveyances and wrongful distribution must be dismissed because they are based on a breach of the License Agreement, and there was no breach.

In response, plaintiff cross-moves to have the motion to dismiss converted to a summary judgment motion, and for summary judgment in its favor on the first through third causes of action for breach of contract, breach of the covenant of good faith and indemnification. Plaintiff argues that there was a breach of the agreement by Crescent's failure to build. It asserts that in the first sentence of Section 3, Crescent expressly covenanted to design, build and construct the Tower Property. It urges that Crescent is inappropriately trying to use the title of the agreement, that is "License Agreement," and the caption of Section 3, "Trump Standard; Trump Standard Default: Power of Attorney," to twist the meaning of the "simple, straightforward promise to construct the Tower Property" (Opp Br. at 22). It contends that Crescent's interpretation does violence to Section 9 of the License Agreement, which gives Crescent the right to terminate only upon a substantial forced taking (by condemnation or eminent domain), or, if before 70% of the

units in the building are sold, Donald J. Trump dies, is permanently incapacitated, is no longer a principal of plaintiff, or for other specified reasons which did not occur (OtSC, Ex B, § 9, at 12).

Plaintiff also contends that Crescent's interpretation conflicts with Section 7 (b) regarding termination by Crescent following a default by plaintiff after notice and opportunity to cure. Further, plaintiff argues that Section 4, which compels Crescent to deliver plans and specifications to plaintiff, gives plaintiff the right to issue deficiency notices indicating its objections and gives both parties the right to terminate, supports its interpretation that Crescent could not terminate for whatever reason. It counters that Section 8 (h), upon which Crescent relies, is inapplicable, because it deals with construction delays, not a sale to a third party, and it would require plaintiff to wait two years to terminate its 3 ½ year negative covenant. Finally, Section 6, according to plaintiff, which specifies the term of the agreement, does not specify a sale of the property as the end of the term and, therefore, it cannot be relied upon by Crescent. Plaintiff urges that under its interpretation of the License Agreement, Crescent has breached as a matter of law and it is entitled to summary judgment of liability on its claims.

With respect to its implied covenant claim, plaintiff asserts that a promise to build should be implied and it is entitled to take discovery thereon. Plaintiff contends that its unjust enrichment claim cannot be dismissed unless its contract claim is granted. Plaintiff also contends that its indemnification claim should not be dismissed because Section 11 of the License Agreement covers action arising out of Crescent's "acts or omissions in breach or default of this Agreement" (*id.*, § 11, at 12).

The individual defendants seek dismissal of the claims against them on the ground that they are not, and never were, members of Crescent, and they did not receive any distribution of

the sales proceeds. They submit documentary evidence supporting this assertion (CPLR 3211 [a] [1]). They also seek dismissal of the fraudulent conveyance claims on the additional ground that plaintiff fails to plead fraud with particularity. They further argue that the claims are insufficient because they simply parrot the language in the statute and fail to contain any supporting facts. With respect to the wrongful distribution claim, again, they argue that they were not members of Crescent and that they did not receive any of the proceeds of the sale of the land.

Plaintiff cross-moves, in response to the individual defendants' motion, seeking permission to amend the complaint to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants (CPLR 1024), based on their identification by the individual defendants as the actual members of Crescent. It claims that it is not required to elect its remedies and may pursue its claim for unjust enrichment at the same time as its claim for breach of contract. It also argues that the documentary evidence does not establish that the individual defendants did not receive proceeds from the sale of the land, only that they were not members of Crescent.

DISCUSSION

The motions to dismiss by defendant Crescent and the individual defendants are granted, and the complaint is dismissed. Plaintiff's cross motion for summary judgment against Crescent on the first three causes of action is denied, and its cross motion to amend is also denied as moot.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "factual claims . . . flatly contradicted by documentary evidence are not entitled to such

consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citations omitted], *appeal denied* 80 NY2d 788 [1992]; *see Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994]). Moreover, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see e.g. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]), or conclusively establishes a defense to the asserted claims as a matter of law (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Here, even giving the complaint such a liberal construction, the Court, nevertheless, concludes that the License Agreement was not a promise by Crescent to build, it did not provide plaintiff with any remedy other than termination, and there was no breach of its provisions warranting dismissal of the breach of contract claim, as well as the other claims, many of which depend upon such a breach for their allegations.

The linchpin of this action is the first claim for breach of contract. In it, plaintiff asserts that the License Agreement obligated Crescent to design and build the Tower Property, market the condominium units for sale and pay plaintiff royalties, and that Crescent breached these obligations. This claim must be dismissed based on the clear and unambiguous language of the License Agreement and its purpose. Construction of an unambiguous contract is a matter of law appropriate for disposition by the Court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the Court must first look within the four corners of the document, and enforce it without recourse to parol evidence (*ABS Partnership v AirTran*

Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003]). The parties' agreement should be read as a whole to determine its purpose and intent (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162). It also should be construed as to give meaning and effect to all of its provisions (*id.*; *see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]). A contract does not become ambiguous just because the parties argue different interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). It should be construed and enforced according to its terms, particularly when it is drafted by "sophisticated and counseled business persons" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). The Court must interpret the contract, giving effect to the parties' expressed intentions and adopting an interpretation which gives effect to all of its provisions (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d at 28; *see also PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268 [1st Dept], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

The License Agreement is clear and unambiguous, and may be interpreted as a matter of law. First, as its title indicates, the agreement is a license agreement in which plaintiff agreed to allow Crescent to use the Trump Mark for a condominium building Crescent intended to build in Israel, and Crescent agreed to pay royalties for the use of the name (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 206 [1st Dept 2007], *lv dismissed* 10 NY3d 800 [2008] [court may look at headings in a contract to help interpret]). It did not obligate Crescent to build and market the condominium; it was simply a license arrangement (*see Long Island R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 461-62 [1977] [license agreement was not an obligation

to construct and operate a pipeline]). The contract provisions support this interpretation. In the third "Whereas" clause, Crescent states, in relevant part, that it

> **intends** to (i) develop a building . . . on certain land . . . owned or to be acquired by [Crescent] in Ramat Gan, Israel . . . which upon completion of construction will include a first-class, luxury residential condominium component, . . . and, a retail component . . . ; (ii) design, develop, construct and operate the Tower Property . . . in the form of condominium ownership; and (iii) market, sell and/or lease the units

(OtSC, Ex B, at 1 [emphasis added]). Crescent agreed that it would perform these activities in accordance with the "Trump Standard," as that is defined in the agreement (*id.*). Contrary to plaintiff's contention, there is no language in this "Whereas" clause, or anywhere else in the agreement, in which Crescent promised to build, construct and operate the condominium. Instead, it just indicated that Crescent intended to do so and that, if it did, it would pay plaintiff royalties for the use of its name.

Section 3(a), relied upon by plaintiff, also does not constitute a promise by Crescent to build. That provision is entitled "Trump Standard; Trump Standard Default; Power of Attorney." This title itself indicates that it was addressing the quality of the building – that it was to be built according to the "Trump Standard" (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d at 206 [it is appropriate to look at headings in interpreting the parties' agreement]; *Beltrone Constr. Co. v State of New York*, 189 AD2d 963, 966 [3d Dept], *lv denied* 81 NY2d 709 [1993] [look at headings in interpreting agreement]).

Section 3, subsections a and b, provide that if the building is built, Crescent agrees to design and develop the property with the level of quality and luxury associated with a building known as the Akirov Building in Tel Aviv, Israel, referred to as the "Signature Property," and

maintain it with the standards followed by the Signature Property, then referred to as the "Trump Standard." Subsection c provides that plaintiff would be the sole judge of whether Crescent was maintaining the Trump Standard. Subsection d provides that plaintiff would at all times have access to, and the right to inspect the property. Subsection e indicates that Crescent would sign a Power of Attorney so that plaintiff could register the agreement with the Israeli governmental authority. Thus, all of section 3, read together, addresses the purpose of that section, to ensure quality control, that is, to make sure that if the property is to bear the Trump Mark, Crescent would maintain a certain level of quality and luxury commensurate with that of the Signature Property. Contrary to plaintiff's contention, none of these provisions constitute a promise by Crescent to build. As Crescent aptly argues, both plaintiff and Crescent were sophisticated and well-counseled business entities and if they had intended to create a promise by Crescent to build, they could have easily drafted such a provision. They did not, and the Court will not imply such a promise.

This interpretation makes sense when considering that, at the time that the contract was entered into, Crescent did not own all the property that was needed to build the project (*see* Compl, ¶17). In fact, Crescent did not acquire title to all of the constituent parcels constituting the land for the project until almost a year after the License Agreement was executed (*id.*). Moreover, as pled in the complaint, Crescent needed to obtain a zoning variance to be able to build the property as it intended – residential and some retail, and without office space (*id.*, ¶ 26).

Section 8, which provides for plaintiff's right to terminate the agreement, further supports the conclusion that this was a license agreement, not a promise to build. Specifically, in section

8(h) plaintiff is granted the right to terminate the agreement and the rights licensed thereunder, upon 10 days' written notice, if

> (h) The construction of the Building fails to commence within twenty-four (24) months from the date of this Agreement, unless such delay shall result from any strikes, lockouts or labor disputes, . . . or other events similar to the foregoing beyond the reasonable control of [Crescent] (collectively, "Unavoidable Delays") in which event such twenty-four (24) month period shall be deemed extended one (1) day for each day of Unavoidable Delay . . .

(OtSC, Ex B, § 8[h], at 11). Thus, if the construction does not begin within two years because of avoidable delays, that is, delays within Crescent's control, plaintiff could terminate the License Agreement and any rights licensed under it. The parties thus provided a remedy to plaintiff if Crescent failed to begin construction of the building – termination and revocation of the license. The other subsections of Section 8 provide additional situations under which plaintiff could terminate the license, such as Crescent's bankruptcy, insolvency, the building is destroyed by fire, the property is taken by condemnation or eminent domain and closings for at least 70% of the units have not taken place within 40 months (*id.*, at 10-11). Finally, in subsection l, the parties provided that, notwithstanding the termination of the agreement, plaintiff would still be entitled to royalties that accrued prior to the termination (*id.*, § 8[l]). Section 8 clearly provides, therefore, that in the event of plaintiff's termination of the agreement, for example, for failure to begin construction based on avoidable delay by Crescent, plaintiff's remedies were termination and royalties that accrued prior to such termination. It does not provide, as plaintiff seeks here, damages for windfall profits if the land were sold and the construction permit was never issued. Again, if the parties, who were sophisticated business entities, sought to include a liquidated damages provision, or a provision that failure to begin construction would be a breach or default

under the agreement, they could have so provided, but they did not. The Court will not write a new agreement for the parties under the guise of contract interpretation.

Section 14, entitled "Representations and Warranties: Covenants," sets forth the representations of both parties. In subsection b, referring to Crescent's representations, Crescent makes representations about its corporate standing and its ability to enter into the agreement. There is, however, no covenant that Crescent was covenanting or promising to build, or promising to use good faith efforts to build.

Section 9, relied upon by plaintiff, does not conflict with this interpretation. Section 9, entitled "Licensee's Termination," provides Crescent with a reciprocal right to termination. It states that, "[n]otwithstanding anything to the contrary herein, including but not limited to Paragraph 7 (b)," regarding plaintiff's default and time to cure, Crescent has the absolute right to terminate if the building is taken in condemnation or eminent domain, or if before 70% of the units are sold, Donald Trump dies, goes into bankruptcy, is no longer a principal of plaintiff, or is convicted of a felony (*id.*, § 9, at 11-12). Like Section 8, it limits Crescent to the right to terminate as its remedy. The provision cannot be construed as a promise to build, or an agreement that Crescent could not terminate based on its own failure or inability to construct the building. It further supports the reading that the parties had a reciprocal right to terminate, and that the only damages which naturally flowed from breach and which were contemplated were royalties to plaintiff if they had accrued prior to termination (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-22 [1989][unusual or extraordinary damages limited to those in parties' contemplation]).

Plaintiff's argument that under Crescent's interpretation, the restrictive covenant in

Section 1 of the License Agreement requires plaintiff to continue not to use the New Trump Mark in the relevant area for 3 ½ years, even after the land was sold, fails to take into account all of the language in that section. In subsection g of Section 1, the first clause provides that "provided that . . . this Agreement is in full force and effect," then plaintiff is required to abide by the restrictive covenant (*id.*, § 1[g], at 4). It is apparent that when the land was sold to a third party, the License Agreement was no longer in full force and effect and, therefore, plaintiff was not still subject to the restrictive covenant therein.

Section 7 (b) fails to provide support for plaintiff's reading of the agreement. It simply provides that if plaintiff is in default in any of its material obligations, and the default is not cured within 30 days after notice, then Crescent may terminate the agreement. It has nothing to do with any promise to build, or the situation where there is no building and construction has not commenced. Similarly, Section 4, like Section 3, is all about meeting the Trump Standard by submitting plans and specifications. It does not include a promise or covenant by Crescent to build. Section 6 simply provides that the term of the agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark" (*id.*, § 6, at 9). This, like the other sections relied upon by plaintiff, cannot be construed to convert this agreement from purely a license agreement into a promise by Crescent to build the building.

In *Long Island R.R. Co. v Northville Indus. Corp.* (41 NY2d 455), the Court of Appeals considered and rejected a similar argument that a license agreement, regarding the installation and use of an oil pipeline along plaintiff's right of way, obligated the defendant to construct the oil pipeline. In the parties' agreement, which was characterized in the agreement as a license

agreement, the plaintiff railroad granted the defendant the right and privilege to construct, install, use, operate and maintain a pipeline along the plaintiff's right of way. The defendant agreed to pay the railroad $10,000 in advance, during which the defendant would procure the necessary consents, permits or other authority and construct the pipeline and, after construction or a three-year period had passed, then defendant would pay a certain fee based on the size of piping or the output, with a guaranteed minimum of $20,000 per year. The agreement provided for cancellation rights by the defendant within the first three years and, by the railroad, if defendant did not complete at least half of the pipeline during that three-year period. The Court held that the express terms of the agreement did not obligate the defendant to construct and operate a pipeline along the railroad's right of way. "The agreement was purely and simply a license arrangement" (*id.* at 461). It found that to construe the various portions of the agreement in such a way as "to place an obligation on Northville to exercise the privilege granted to it, as urged by the railroad, would be contrary to the obvious intention of the parties as expressed therein" (*id.*). The Court further rejected the railroad's argument, similar to plaintiff's argument in the instant case, that even in the absence of an express contractual requirement to build the pipeline, defendant should be impliedly obligated to construct, operate and maintain a pipeline (*id.*). It found that the agreement "manifests that had such an obligation been intended, it would have been expressed" (*id.* at 462).

Similarly, here, the agreement was purely a license agreement, as its name implies. The agreement states that Crescent "intends to build," and never indicates that it promised to build. It makes sense that there was no promise to build since Crescent did not yet own the parcels of land, or have the approvals required to build the condominium it was intending to build. To

construe the provisions plaintiff relies upon to obligate Crescent to build would be contrary to the intention of the parties as expressed in the License Agreement (*see id.*). Moreover, plaintiff's argument that even if there was not an express requirement in the agreement to build, Crescent should be impliedly obligated to construct the building is rejected. As in the *Northville* case, this agreement manifests that had such an obligation been intended, it would have been expressed in the License Agreement.

Therefore, the License Agreement does not obligate Crescent to build, and plaintiff cannot assert the failure to build as a breach of the agreement. Accordingly, there is no breach of contract, warranting dismissal of the first cause of action.

The second cause of action, for breach of the implied duty of good faith and fair dealing also is dismissed. Plaintiff alleges that Crescent breached such duty by selling the land without having built the building, thereby frustrating the purpose of the License Agreement, depriving plaintiff of the benefit of the bargain and reaping a windfall profit (Compl, ¶¶ 42-43). It is well-established that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (*see Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [breach of implied duty of good faith claim is invalid substitute for nonviable breach of contract calim]; *TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of covenant of good faith, because it was redundant of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of breach of the implied covenant claim where it was "merely a substitute for a nonviable breach of contract claim"]). Plaintiff, here, has failed to allege a breach of the License

Agreement, or any damages flowing from such a breach. Therefore, its implied duty of good faith claim based on the same allegations must be dismissed (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214, 214 [1st Dept], *lv dismissed in part, denied in part* 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]; *accord Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000] [breach of implied covenant claim dismissed as redundant of breach of contract claim]; *Business Networks of New York, Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999] [same]).

In addition, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, that intrinsic tie is apparent on the face of the complaint, where it seeks the identical damages sought in the breach of contract claim of not less than $45 million. Accordingly, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

The third cause of action, a contractual indemnification claim, is dismissed. This claim is based on Section 11 of the License Agreement, which provides that Crescent agreed to indemnify, defend, and hold harmless plaintiff, from and against any and all causes of action "arising in whole or in part, directly or indirectly, out of (i) Licensee's . . . acts or omissions in breach or default of this Agreement" (OtSC, Ex B, § 11, at 12). As determined above, there was

no breach of this agreement by Crescent's failure to build on the Tower Property. Therefore, there is no basis on which to seek indemnification. The Court also notes that this indemnification provision was not "unmistakably clear," or "exclusively or unequivocally referable to claims between the parties themselves" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492[1989]).

The fourth cause of action for unjust enrichment, asserted against Crescent and the individual defendants is dismissed. It is well-settled that where there is a valid and binding contract governing the subject matter of the parties' dispute, recovery for unjust enrichment for events arising out of the same subject matter is precluded (*see Apfel v Prudential-Bache Secs.*, 81 NY2d 470, 478-79 [1993]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [the agreement governs the subject of the dispute, and also bars the claims against the individual defendants even though they were not signatories to that agreement]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]). Here, the License Agreement governs the subject matter of the dispute over whether Crescent was obligated to build the condominium.

The fifth, sixth, and seventh causes of action, asserted against all the defendants and seeking recovery for fraudulent conveyances (constructive and actual fraud) and attorneys' fees under Debtor and Creditor Law §§ 273-276 and 276-a, all are dismissed. These claims assert that the distribution of the net proceeds of Crescent's sale of the Tower Property to the individual defendants was a conveyance to avoid Crescent's debt to plaintiff. These claims, however, are based on plaintiff's assertion that it is a creditor of Crescent because of Crescent's breach of the License Agreement. As determined above, there was no breach of that agreement by Crescent's

sale of the land, and there is no basis for indemnification under that agreement as well. Therefore, plaintiff cannot establish itself as a creditor of Crescent, and the fraudulent conveyance claims fail (*see Salovaara v Eckert*, 6 Misc 3d 1005[A], 2005 NY Slip Op 50010 [U] *9 [Sup Ct, NY County 2005, Lowe, J.], *affd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]). The Court also notes that the individual defendants have submitted documentary evidence demonstrating that they were not members of Crescent, and that they did not receive the sale proceeds, providing an additional basis for dismissal of these claims against them.

Finally, the eighth cause of action for wrongful distribution is also dismissed, because it is based on the allegations that there was a breach of the License Agreement by the sale of the property and that the distribution of those proceeds was wrongful. Again, as determined above, there was no obligation by Crescent to build, and its sale of the property did not breach the License Agreement. Thus, there is no basis for a wrongful distribution claim.

The Court has considered the plaintiffs's remaining arguments, and considers them to be without merit.

In light of the above, plaintiff's cross motion for summary judgment in its favor on the first three causes of action is denied. In addition, its cross motion to amend to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants in this action on the ground that they are members of defendant Crescent and, as such, are liable on the fraudulent conveyance and wrongful distribution claims, is denied. As stated above, there is no basis for those causes of action because plaintiff has failed to plead a breach of the License Agreement and has not shown that it is a creditor of Crescent.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Crescent Heights Diamond, LLC is granted, and the complaint as against defendant Crescent Heights Diamond LLC is dismissed with costs and disbursements to defendant Crescent as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin is granted, and the complaint is dismissed as against these defendants with costs and disbursements to these individual defendants Kahn, Galbut, and Menin as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion to amend is denied.

Dated: December 22, 2008

ENTER:

J.S.C.

Remy Stocks

From: e-Watch@e-law.com
Sent: Friday, January 23, 2009 2:02 PM
To: Remy Stocks
Subject: eLaw: TRUMP MARKS LLC v. CRESCENT HEIGHTS eWatch Alert!

This eWatch alert is provided to you by eLaw.com. The following development has occurred in:

Court System: State of New York, Supreme Court
County: NEW YORK
Index: 601372/2008
Name: TRUMP MARKS LLC v. CRESCENT HEIGHTS
Status: DISPOSED, MOTION PENDING

By MOTION, originally made returnable on October 7, 2008, MEISTER SEELIG & FEIN LLP for the PLAINTIFF moved this court, in IAS MOTION 49, seeking the following relief: OTHER RELIEFS. This motion is currently pending before the court and is assigned to Judge FRIED, BERNARD J.

*** Appearance Held ***

On January 21, 2009, an appearance was held on this motion before Judge FRIED, BERNARD J. in MOTION SUPPORT OFFICE. The clerk marked the motion ADJOURNED with the following additional comments: ARG 2:15PM.

*** Appearance Scheduled ***

On February 17, 2009, an appearance is scheduled on this motion before Judge FRIED, BERNARD J. in IAS MOTION 60EFM. The following additional comments exist: ARG 2:15PM.

The attorneys of record for this case are:
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BERNARD J. FRIED Justice

PART 49

E-FILE

Team2 Marks LLC

INDEX NO. 601372/08

MOTION DATE

-v-

MOTION SEQ. NO. 006

Crescent Heights Diamond et al

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
Feb 06 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

By Decision and Order, dated December 22, 2008, Justice Herman Cahn, dismissed the complaint in this action; accordingly, this motion (#006) is DENIED as moot.

SO ORDERED

Dated: 2/5/09

HON. BERNARD J. FRIED J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

TRUMP MARKS LLC,

Plaintiff,

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

Index No.: 601372/08

NOTICE OF APPEAL

PLEASE TAKE NOTICE that plaintiff Trump Marks LLC ("Plaintiff") hereby appeals to the Appellate Division of the Supreme Court, First Department, from the Order of the Hon. Herman Cahn, dated December 22, 2008, and entered in the above-entitled action in the office of the Clerk of the Court of New York County on December 23, 2008 (a copy of which is annexed hereto as Exhibit A), which granted the motion to dismiss by Crescent Heights Diamond LLC and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin.

Dated: New York, New York
January 21, 2009

MEISTER SEELIG & FEIN LLP

By: _____

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	:	Index No. 601372/08 **PRE-ARGUMENT STATEMENT**

Pursuant to §600.17 of the Rules of the Appellate Division, First Department, the following Pre-Argument Statement is respectfully submitted by Plaintiff Trump Marks LLC ("Appellant"):

1. The title of the action and the index number of this case in the Supreme Court, New York County, are as set forth in the above caption.

2. The full names of the original parties are as stated in the above caption.

3. The names, addresses and telephone numbers of counsel for all parties are as follows:

Attorneys for Appellant:

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Crescent Heights Diamond, LLC:

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Attn: Richard D. Emery, Esq.

4. This is an appeal taken from an Order of the Hon. Herman Cahn, Supreme Court of the State of New York, County of New York, dated December 22, 2008, and entered in the office of the Clerk of the County of New York on December 23, 2008, which granted the motion to dismiss by Crescent Heights Diamond LLC ("Crescent") and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin (collectively, the "Individuals Defendants").

5. Appellant is engaged in the business of licensing various trademarks held by real estate developer and builder Donald J. Trump. This action arises out of a license agreement between Appellant, as licensor, and Crescent, as licensee (the "License Agreement"), whereby Appellant licensed to Crescent the right to name and brand as "Trump Tower" or "Trump Plaza," a luxury condominium building to be built by Respondents, on a site Crescent had assembled and acquired in Ramat Gan, Israel. Nine months after entering into the License Agreement, Crescent sold the subject site to another developer, for over $80 million, netting a profit of $36 million, without seeking to develop it into a condominium project, which efforts it had explicitly undertaken under the Licensing Agreement. Respondents effected this sale after Appellant had fulfilled its promises under the License Agreement to file and perfect a trademark application in Israel for the Trump

name, and after Mr. Trump had aggressively promoted his association with the project in the worldwide media. Appellant asserts that such a staggering profit was made possible solely by virtue of the project site's association with the Trump name and Mr. Trump's promotion of the project, and, in its verified complaint, asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification against Crescent, and for unjust enrichment, violations of the fraudulent conveyance laws and legal fees against Respondents.

6. On December 22, 2008, the Supreme Court, New York County (Cahn, J.) issued an Order, entered in the office of the Clerk of the County of New York on December 23, 2008, notice of entry of which was served by Respondents on December 23, 2008. A copy of the Order and the Notice of Entry is attached hereto as Exhibit A. The Order granted the motion to dismiss by Crescent Heights Diamond LLC and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin.

7. Appellant seeks reversal of the Order on the grounds that the Supreme Court below misapprehended the facts and the law of the case.

Dated: New York, New York
January 21, 2009

MEISTER SEELIG & FEIN LLP

By: _____

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To:

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	Index No.: 08/601372 (Cahn, J.) **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached true copy of the Decision and Order, dated December 22, 2008, in the above-captioned matter, was entered in the Office of the Clerk of the County of New York on December 23, 2008.

Date: December 23, 2008
New York, New York

EMERY CELLI BRINCKERHOFF & ABADY LLP

By: _____

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Attorneys for Defendants Sonny Kahn, Russell Galbut, and Bruce Menin

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn *Justice* PART 45m

Trump Marks LLC,

-v-

Crescent Heights Diamond LLC

INDEX NO. 601372/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to_____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . .

Dated: 12/23/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

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TRUMP MARKS LLC,

Plaintiff,

-against-

Index No. 601372/08

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------x

Herman Cahn, J.:

Motion Sequence Numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order.

Defendants Crescent Heights Diamond, LLC (Crescent), Sonny Kahn, Russell W. Galbut, and Bruce A. Menin move to dismiss the complaint against them (CPLR 3211 [a] [1] and [7]). Plaintiff Trump Marks LLC cross-moves for an order granting it summary judgment on its claims (CPLR 3211 [c] and 3212), and for an order granting it permission to amend to add two new defendants (CPLR 1024).

This action arises from a licensing agreement between plaintiff and defendant Crescent, under which plaintiff licensed to Crescent the right to use the name "Trump Tower" in connection with a condominium building Crescent intended to build in Israel. Crescent failed to build the condo and, instead, sold the land to a third party for a profit. Plaintiff brought this action for breach of contract and unjust enrichment against Crescent. It also asserts claims

against the principals of Crescent, the individual defendants, for violations of the fraudulent conveyances law.

Defendant Crescent seeks dismissal, arguing that the license agreement provides that if it did not build within two years, for any reason within its control, plaintiff's remedy was termination. It argues that, if Crescent used the licensed marks after termination of the agreement, then plaintiff would have the right to damages. Crescent contends that there is no other remedy contemplated in the agreement, and that the Court should reject plaintiff's invitation to rewrite the agreement, made between sophisticated and counseled parties, to create other remedies. Crescent urges that plaintiff was nothing more than a licensor, not a partner in the transaction to develop a building.

The individual defendants, Kahn, Galbut and Menin, urge that the complaint be dismissed against them because they are not, and have never been members of Crescent, a limited liability company, and they did not receive any distribution of the sale proceeds from the sale of the land. Therefore, they argue that they cannot be required to return a conveyance or distribution they did not receive. They also argue that the unjust enrichment claim is barred because there is a written agreement, the license agreement, covering the matter. They urge that the fraudulent conveyance claim also is insufficient because the sale was not a breach of the license agreement, plaintiff failed to plead fraud with particularity and failed to plead the necessary elements of a fraudulent conveyance claim. They further argue that the wrongful distributions claim is insufficient because Crescent's liabilities do not exceed its assets.

BACKGROUND

Plaintiff is a Delaware limited liability company, and is in the business of licensing certain United States trademarks of Donald Trump, covering real estate and related services with the designation "Trump" (Compl, ¶ 2). Defendant Crescent, a Delaware limited liability company, is engaged in the business of building and developing first-class residential condominium properties (*id.*, ¶ 5). The individual defendants, Kahn, Galbut and Menin, are allegedly members of Crescent (*id.*, ¶¶ 6-11).

On May 23, 2006, plaintiff, as licensor, entered into an agreement with defendant Crescent, as licensee, in which plaintiff licensed the Trump name for Crescent's use in connection with the development of a building on land owned or to be acquired by Crescent in Ramat Gan, Israel (Indiv Def Order to Show Cause (OtSC), Ex B). Crescent intended to develop the building as a "first-class, luxury residential condominium" with a retail component; to design, develop, and operate it in the form of condominium ownership; and to market, sell, and/or lease the units in the building, all to be performed in accordance with the "Trump Standard" (therein defined), to maximize the value of the property for the benefit of both the licensor and the licensee (*id.*, at 1). The building to be constructed on the property was going to be the tallest structure in Israel with 786,000 square feet of space. It could not be constructed as a residential and retail development without obtaining variances from the appropriate Israeli authorities (Compl, ¶¶ 14, 27).

Pursuant to the License Agreement, Crescent was licensed to use the name "Trump Tower," or "Trump Plaza," which was then referred to in the agreement as the "New Trump Mark" (*id*; *see also* OtSC, Ex B, First amend to License Agmt, at 1). It agreed to pay plaintiff

royalties for the rights granted in the agreement (*id.*, § 5 [a], at 9). Crescent also agreed to design, develop, construct, market, sell, equip, operate, repair and maintain the property with the level of quality and luxury associated with the condominium building known as the Akirov Building in Tel Aviv, Israel, referred to as the Signature Property in the License Agreement (*id.*, § 3 [a]).

In the License Agreement, plaintiff agreed to be subject to a covenant restricting its right to further license its name in the area. Specifically, the License Agreement stated that, "provided the Agreement was in full force and effect," until the first to occur of 42 months from the execution of the agreement, or the date on which 90% of the units are subject to binding contracts of sale, plaintiff would not license the name "Trump" for a residential condominium building within the area of Tel Aviv, Israel, and within 12 months from the date of the agreement, plaintiff would not license the "Trump" name for a "Condominium Hotel" as defined therein (*id.* at 4). Plaintiff agreed to cause Donald J. Trump to make one trip to the Tower Project for no more than one day of six working hours for the promotion of the project to the public (*id.*, § 1 [h]).

Plaintiff was permitted to terminate the agreement for "Trump Standard Defaults," such as Crescent failing, inter alia, to design, develop and maintain the property in accordance with the Trump Standard (*id.*, § 3, at 6-7), and for "non-Trump Standard Defaults" such as Crescent failing to pay money due (*id.*, § 7, at 10). Plaintiff was also permitted to terminate in "addition to any other right or remedy of Licensor" upon 10 days' written notice for reasons such as licensee's bankruptcy, fire damaging or destroying the building, the individual defendants ceasing to own and control the licensee, failure to commence construction within 24 months,

failure of the issuance of certain forms for the commencement of construction, and failure to close with regard to at least 70% of the units within 40 months (*id.*, § 8, at 10-11). The License Agreement provided that, notwithstanding its termination pursuant to any of its terms, plaintiff "shall be entitled to receive, and Licensee shall pay to Licensor all Royalties that have accrued to Licensor prior to the date of termination" (*id.*, § 8 [l], at 11).

The term of the License Agreement commenced upon its execution and "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark, and Licensor and Licensee have not agreed in writing or are not in substantive discussions for the use of a Trump Name as the name of the Tower Project" (*id.*, § 6, at 9).

The parties set forth their agreement with regard to royalties. They provided that an initial non-refundable payment of $1,000,000 was to be made to plaintiff on the date that Crescent is issued the initial construction permit for the commencement of construction. Crescent was further obligated to make royalty payments in connection with a percentage of the average aggregate sales prices per square foot, and a percentage of gross rental payments, of residential units and non-residential areas (*id.*, Ex A, at A-1).

In May 2006, plaintiff registered the licensed mark "Trump Plaza" with the Israeli Trademarks Office (Compl, ¶ 19).

In December 2006, Donald Trump, via a satellite video feed, spoke at the Israeli Business Conference, promoting and associating himself with the land and the Tower Project (*id.*, ¶ 20).

On April 30, 2007, Crescent acquired title to all of the constituent parcels constituting the land at a cost of approximately $44 million (*id.*, ¶ 17).

Crescent, however, asserts that it was unable to procure the necessary approvals to permit the construction of the Tower Property as a purely residential and retail property, as opposed to a mixed-use, residential, retail and office project, from the relevant Israeli authorities (*id.*, ¶ 25).

In or about August 1, 2007, plaintiff became aware that Crescent was negotiating to sell the land to a third party developer (*id.*, ¶ 21). On August 2, 2007, plaintiff notified Crescent that the sale of the land would result in Crescent's default under the License Agreement, causing substantial damage to plaintiff in that it would not receive royalties, its reputation would be damaged and Crescent would be unjustly enriched (*id.*, ¶ 22).

In January 2008, Crescent sold the land to Azorim Investment, Development and Construction Ltd. for approximately $80.2 million (*id.*, ¶¶ 23-24).

Plaintiff alleges that the sale was in breach of the License Agreement. It contends that section 3(a) of the License Agreement imposed an unqualified obligation on Crescent to design and construct the Tower Property. It argues that Crescent's obligations were not excused because it was unable to obtain the necessary approvals to build the Tower Property as envisaged (*id.*, ¶¶ 25-28). Plaintiff asserts that Crescent knew that it had to obtain permits, approvals, and/or variances from the authorities when it signed the License Agreement, and it failed to make bona fide efforts to obtain them (*id.*, ¶¶ 28, 31).

In the complaint, plaintiff asserts eight causes of action. The first three are against Crescent only for breach of the License Agreement; breach of the implied covenant of good faith and fair dealing by selling the land, and depriving plaintiff of the benefit of the License Agreement; and contractual indemnification for losses, attorneys' fees and disbursements in bringing this action. The remaining five causes of action are asserted against all the defendants.

The fourth is for unjust enrichment, claiming that the sale of the land resulted in a windfall profit for defendants which was realized by virtue of "the world renowned reputation of Donald J. Trump as the preeminent developer of luxury residential properties," and that defendants must make restitution to plaintiff of that windfall profit. The fifth and sixth are for fraudulent conveyances under the Debtor and Creditor Law §§ 273-276, and the seventh seeks attorneys' fees under Debtor and Creditor Law § 276-a. Finally, the eighth seeks recovery of the wrongful distribution of the net proceeds of the sale to the members of Crescent, in violation of New York Limited Liability Company Act § 508 or of section 18-607 of the Delaware Limited Liability Company Act.

In moving to dismiss, Crescent asserts that it did not construct the building, the required variances were not granted, no permit to construct the building was issued and the project never went forward to the final plans and specifications stage. Crescent argues that the License Agreement provides that if it did not build within two years for any reason within Crescent's control, plaintiff's only remedy was termination of the License Agreement and revocation of the license. With regard to royalties, Crescent asserts that it agreed to pay $1,000,000 to plaintiff if and when a construction permit were issued. It also agreed to pay additional royalties, if any, when any units in the building were sold, and provided they sold for more than a minimum price per square foot. None of these events occurred, so, Crescent argues, no royalties are due. Crescent contends that although the License Agreement could have provided for an initial, non-refundable payment upon signing, it did not. It also did not include any form of penalty or liquidated damages if the building was not built, nor did it include any clause which would provide plaintiff with a percentage of the profit if the land were resold. Crescent argues that

these provisions should not be read into the agreement, particularly where both parties are sophisticated and counseled. It urges that this was a non-exclusive licensing agreement which placed minimal restrictions on plaintiff's ability to exploit its mark worldwide.

Crescent also contends that the breach of the implied covenant claim is insufficient because it is redundant of the breach of contract claim. The indemnification claims fails because it depends upon a breach or default which Crescent asserts does not exist and because that provision refers to claims by third parties, not a breach of contract claim between Crescent and plaintiff. Crescent urges that the unjust enrichment claim fails because there is a contract that governs the subject matter of the parties' dispute. Crescent further urges that the remaining three claims for fraudulent conveyances and wrongful distribution must be dismissed because they are based on a breach of the License Agreement, and there was no breach.

In response, plaintiff cross-moves to have the motion to dismiss converted to a summary judgment motion, and for summary judgment in its favor on the first through third causes of action for breach of contract, breach of the covenant of good faith and indemnification. Plaintiff argues that there was a breach of the agreement by Crescent's failure to build. It asserts that in the first sentence of Section 3, Crescent expressly covenanted to design, build and construct the Tower Property. It urges that Crescent is inappropriately trying to use the title of the agreement, that is "License Agreement," and the caption of Section 3, "Trump Standard; Trump Standard Default: Power of Attorney," to twist the meaning of the "simple, straightforward promise to construct the Tower Property" (Opp Br, at 22). It contends that Crescent's interpretation does violence to Section 9 of the License Agreement, which gives Crescent the right to terminate only upon a substantial forced taking (by condemnation or eminent domain), or, if before 70% of the

units in the building are sold, Donald J. Trump dies, is permanently incapacitated, is no longer a principal of plaintiff, or for other specified reasons which did not occur (OtSC, Ex B, § 9, at 12).

Plaintiff also contends that Crescent's interpretation conflicts with Section 7 (b) regarding termination by Crescent following a default by plaintiff after notice and opportunity to cure. Further, plaintiff argues that Section 4, which compels Crescent to deliver plans and specifications to plaintiff, gives plaintiff the right to issue deficiency notices indicating its objections and gives both parties the right to terminate, supports its interpretation that Crescent could not terminate for whatever reason. It counters that Section 8 (h), upon which Crescent relies, is inapplicable, because it deals with construction delays, not a sale to a third party, and it would require plaintiff to wait two years to terminate its 3 ½ year negative covenant. Finally, Section 6, according to plaintiff, which specifies the term of the agreement, does not specify a sale of the property as the end of the term and, therefore, it cannot be relied upon by Crescent. Plaintiff urges that under its interpretation of the License Agreement, Crescent has breached as a matter of law and it is entitled to summary judgment of liability on its claims.

With respect to its implied covenant claim, plaintiff asserts that a promise to build should be implied and it is entitled to take discovery thereon. Plaintiff contends that its unjust enrichment claim cannot be dismissed unless its contract claim is granted. Plaintiff also contends that its indemnification claim should not be dismissed because Section 11 of the License Agreement covers action arising out of Crescent's "acts or omissions in breach or default of this Agreement" (*id.*, § 11, at 12).

The individual defendants seek dismissal of the claims against them on the ground that they are not, and never were, members of Crescent, and they did not receive any distribution of

the sales proceeds. They submit documentary evidence supporting this assertion (CPLR 3211 [a] [1]). They also seek dismissal of the fraudulent conveyance claims on the additional ground that plaintiff fails to plead fraud with particularity. They further argue that the claims are insufficient because they simply parrot the language in the statute and fail to contain any supporting facts. With respect to the wrongful distribution claim, again, they argue that they were not members of Crescent and that they did not receive any of the proceeds of the sale of the land.

Plaintiff cross-moves, in response to the individual defendants' motion, seeking permission to amend the complaint to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants (CPLR 1024), based on their identification by the individual defendants as the actual members of Crescent. It claims that it is not required to elect its remedies and may pursue its claim for unjust enrichment at the same time as its claim for breach of contract. It also argues that the documentary evidence does not establish that the individual defendants did not receive proceeds from the sale of the land, only that they were not members of Crescent.

DISCUSSION

The motions to dismiss by defendant Crescent and the individual defendants are granted, and the complaint is dismissed. Plaintiff's cross motion for summary judgment against Crescent on the first three causes of action is denied, and its cross motion to amend is also denied as moot.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "factual claims . . . flatly contradicted by documentary evidence are not entitled to such

consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citations omitted], *appeal denied* 80 NY2d 788 [1992]; *see Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994]). Moreover, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see e.g. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]), or conclusively establishes a defense to the asserted claims as a matter of law (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Here, even giving the complaint such a liberal construction, the Court, nevertheless, concludes that the License Agreement was not a promise by Crescent to build, it did not provide plaintiff with any remedy other than termination, and there was no breach of its provisions warranting dismissal of the breach of contract claim, as well as the other claims, many of which depend upon such a breach for their allegations.

The linchpin of this action is the first claim for breach of contract. In it, plaintiff asserts that the License Agreement obligated Crescent to design and build the Tower Property, market the condominium units for sale and pay plaintiff royalties, and that Crescent breached these obligations. This claim must be dismissed based on the clear and unambiguous language of the License Agreement and its purpose. Construction of an unambiguous contract is a matter of law appropriate for disposition by the Court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the Court must first look within the four corners of the document, and enforce it without recourse to parol evidence (*ABS Partnership v AirTran*

Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003]). The parties' agreement should be read as a whole to determine its purpose and intent (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162). It also should be construed as to give meaning and effect to all of its provisions (*id.*; *see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]). A contract does not become ambiguous just because the parties argue different interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). It should be construed and enforced according to its terms, particularly when it is drafted by "sophisticated and counseled business persons" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). The Court must interpret the contract, giving effect to the parties' expressed intentions and adopting an interpretation which gives effect to all of its provisions (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d at 28; *see also PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268 [1st Dept], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

The License Agreement is clear and unambiguous, and may be interpreted as a matter of law. First, as its title indicates, the agreement is a license agreement in which plaintiff agreed to allow Crescent to use the Trump Mark for a condominium building Crescent intended to build in Israel, and Crescent agreed to pay royalties for the use of the name (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 206 [1st Dept 2007], *lv dismissed* 10 NY3d 800 [2008] [court may look at headings in a contract to help interpret]). It did not obligate Crescent to build and market the condominium; it was simply a license arrangement (*see Long Island R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 461-62 [1977] [license agreement was not an obligation

to construct and operate a pipeline]). The contract provisions support this interpretation. In the third "Whereas" clause, Crescent states, in relevant part, that it

> **intends** to (i) develop a building . . . on certain land . . . owned or to be acquired by [Crescent] in Ramat Gan, Israel . . . which upon completion of construction will include a first-class, luxury residential condominium component, . . . and, a retail component . . . ; (ii) design, develop, construct and operate the Tower Property . . . in the form of condominium ownership; and (iii) market, sell and/or lease the units

(OtSC, Ex B, at 1 [emphasis added]). Crescent agreed that it would perform these activities in accordance with the "Trump Standard," as that is defined in the agreement (*id.*). Contrary to plaintiff's contention, there is no language in this "Whereas" clause, or anywhere else in the agreement, in which Crescent promised to build, construct and operate the condominium. Instead, it just indicated that Crescent intended to do so and that, if it did, it would pay plaintiff royalties for the use of its name.

Section 3(a), relied upon by plaintiff, also does not constitute a promise by Crescent to build. That provision is entitled "Trump Standard; Trump Standard Default; Power of Attorney." This title itself indicates that it was addressing the quality of the building – that it was to be built according to the "Trump Standard" (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d at 206 [it is appropriate to look at headings in interpreting the parties' agreement]; *Beltrone Constr. Co. v State of New York*, 189 AD2d 963, 966 [3d Dept], *lv denied* 81 NY2d 709 [1993] [look at headings in interpreting agreement]).

Section 3, subsections a and b, provide that if the building is built, Crescent agrees to design and develop the property with the level of quality and luxury associated with a building known as the Akirov Building in Tel Aviv, Israel, referred to as the "Signature Property," and

maintain it with the standards followed by the Signature Property, then referred to as the "Trump Standard." Subsection c provides that plaintiff would be the sole judge of whether Crescent was maintaining the Trump Standard. Subsection d provides that plaintiff would at all times have access to, and the right to inspect the property. Subsection e indicates that Crescent would sign a Power of Attorney so that plaintiff could register the agreement with the Israeli governmental authority. Thus, all of section 3, read together, addresses the purpose of that section, to ensure quality control, that is, to make sure that if the property is to bear the Trump Mark, Crescent would maintain a certain level of quality and luxury commensurate with that of the Signature Property. Contrary to plaintiff's contention, none of these provisions constitute a promise by Crescent to build. As Crescent aptly argues, both plaintiff and Crescent were sophisticated and well-counseled business entities and if they had intended to create a promise by Crescent to build, they could have easily drafted such a provision. They did not, and the Court will not imply such a promise.

This interpretation makes sense when considering that, at the time that the contract was entered into, Crescent did not own all the property that was needed to build the project (*see* Compl, ¶17). In fact, Crescent did not acquire title to all of the constituent parcels constituting the land for the project until almost a year after the License Agreement was executed (*id.*). Moreover, as pled in the complaint, Crescent needed to obtain a zoning variance to be able to build the property as it intended – residential and some retail, and without office space (*id.*, ¶ 26).

Section 8, which provides for plaintiff's right to terminate the agreement, further supports the conclusion that this was a license agreement, not a promise to build. Specifically, in section

8(h) plaintiff is granted the right to terminate the agreement and the rights licensed thereunder, upon 10 days' written notice, if

> (h) The construction of the Building fails to commence within twenty-four (24) months from the date of this Agreement, unless such delay shall result from any strikes, lockouts or labor disputes, . . . or other events similar to the foregoing beyond the reasonable control of [Crescent] (collectively, "Unavoidable Delays") in which event such twenty-four (24) month period shall be deemed extended one (1) day for each day of Unavoidable Delay . . .

(OtSC, Ex B, § 8[h], at 11). Thus, if the construction does not begin within two years because of avoidable delays, that is, delays within Crescent's control, plaintiff could terminate the License Agreement and any rights licensed under it. The parties thus provided a remedy to plaintiff if Crescent failed to begin construction of the building – termination and revocation of the license. The other subsections of Section 8 provide additional situations under which plaintiff could terminate the license, such as Crescent's bankruptcy, insolvency, the building is destroyed by fire, the property is taken by condemnation or eminent domain and closings for at least 70% of the units have not taken place within 40 months (*id.*, at 10-11). Finally, in subsection l, the parties provided that, notwithstanding the termination of the agreement, plaintiff would still be entitled to royalties that accrued prior to the termination (*id.*, § 8[l]). Section 8 clearly provides, therefore, that in the event of plaintiff's termination of the agreement, for example, for failure to begin construction based on avoidable delay by Crescent, plaintiff's remedies were termination and royalties that accrued prior to such termination. It does not provide, as plaintiff seeks here, damages for windfall profits if the land were sold and the construction permit was never issued. Again, if the parties, who were sophisticated business entities, sought to include a liquidated damages provision, or a provision that failure to begin construction would be a breach or default

under the agreement, they could have so provided, but they did not. The Court will not write a new agreement for the parties under the guise of contract interpretation.

Section 14, entitled "Representations and Warranties: Covenants," sets forth the representations of both parties. In subsection b, referring to Crescent's representations, Crescent makes representations about its corporate standing and its ability to enter into the agreement. There is, however, no covenant that Crescent was covenanting or promising to build, or promising to use good faith efforts to build.

Section 9, relied upon by plaintiff, does not conflict with this interpretation. Section 9, entitled "Licensee's Termination," provides Crescent with a reciprocal right to termination. It states that, "[n]otwithstanding anything to the contrary herein, including but not limited to Paragraph 7 (b)," regarding plaintiff's default and time to cure, Crescent has the absolute right to terminate if the building is taken in condemnation or eminent domain, or if before 70% of the units are sold, Donald Trump dies, goes into bankruptcy, is no longer a principal of plaintiff, or is convicted of a felony (*id.*, § 9, at 11-12). Like Section 8, it limits Crescent to the right to terminate as its remedy. The provision cannot be construed as a promise to build, or an agreement that Crescent could not terminate based on its own failure or inability to construct the building. It further supports the reading that the parties had a reciprocal right to terminate, and that the only damages which naturally flowed from breach and which were contemplated were royalties to plaintiff if they had accrued prior to termination (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-22 [1989][unusual or extraordinary damages limited to those in parties' contemplation]).

Plaintiff's argument that under Crescent's interpretation, the restrictive covenant in

Section 1 of the License Agreement requires plaintiff to continue not to use the New Trump Mark in the relevant area for 3 ½ years, even after the land was sold, fails to take into account all of the language in that section. In subsection g of Section 1, the first clause provides that "provided that . . . this Agreement is in full force and effect," then plaintiff is required to abide by the restrictive covenant (*id.*, § 1[g], at 4). It is apparent that when the land was sold to a third party, the License Agreement was no longer in full force and effect and, therefore, plaintiff was not still subject to the restrictive covenant therein.

Section 7 (b) fails to provide support for plaintiff's reading of the agreement. It simply provides that if plaintiff is in default in any of its material obligations, and the default is not cured within 30 days after notice, then Crescent may terminate the agreement. It has nothing to do with any promise to build, or the situation where there is no building and construction has not commenced. Similarly, Section 4, like Section 3, is all about meeting the Trump Standard by submitting plans and specifications. It does not include a promise or covenant by Crescent to build. Section 6 simply provides that the term of the agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark" (*id.*, § 6, at 9). This, like the other sections relied upon by plaintiff, cannot be construed to convert this agreement from purely a license agreement into a promise by Crescent to build the building.

In *Long Island R.R. Co. v Northville Indus. Corp.* (41 NY2d 455), the Court of Appeals considered and rejected a similar argument that a license agreement, regarding the installation and use of an oil pipeline along plaintiff's right of way, obligated the defendant to construct the oil pipeline. In the parties' agreement, which was characterized in the agreement as a license

agreement, the plaintiff railroad granted the defendant the right and privilege to construct, install, use, operate and maintain a pipeline along the plaintiff's right of way. The defendant agreed to pay the railroad $10,000 in advance, during which the defendant would procure the necessary consents, permits or other authority and construct the pipeline and, after construction or a three-year period had passed, then defendant would pay a certain fee based on the size of piping or the output, with a guaranteed minimum of $20,000 per year. The agreement provided for cancellation rights by the defendant within the first three years and, by the railroad, if defendant did not complete at least half of the pipeline during that three-year period. The Court held that the express terms of the agreement did not obligate the defendant to construct and operate a pipeline along the railroad's right of way. "The agreement was purely and simply a license arrangement" (*id.* at 461). It found that to construe the various portions of the agreement in such a way as "to place an obligation on Northville to exercise the privilege granted to it, as urged by the railroad, would be contrary to the obvious intention of the parties as expressed therein" (*id.*). The Court further rejected the railroad's argument, similar to plaintiff's argument in the instant case, that even in the absence of an express contractual requirement to build the pipeline, defendant should be impliedly obligated to construct, operate and maintain a pipeline (*id.*). It found that the agreement "manifests that had such an obligation been intended, it would have been expressed" (*id.* at 462).

Similarly, here, the agreement was purely a license agreement, as its name implies. The agreement states that Crescent "intends to build," and never indicates that it promised to build. It makes sense that there was no promise to build since Crescent did not yet own the parcels of land, or have the approvals required to build the condominium it was intending to build. To

construe the provisions plaintiff relies upon to obligate Crescent to build would be contrary to the intention of the parties as expressed in the License Agreement (*see id.*). Moreover, plaintiff's argument that even if there was not an express requirement in the agreement to build, Crescent should be impliedly obligated to construct the building is rejected. As in the *Northville* case, this agreement manifests that had such an obligation been intended, it would have been expressed in the License Agreement.

Therefore, the License Agreement does not obligate Crescent to build, and plaintiff cannot assert the failure to build as a breach of the agreement. Accordingly, there is no breach of contract, warranting dismissal of the first cause of action.

The second cause of action, for breach of the implied duty of good faith and fair dealing also is dismissed. Plaintiff alleges that Crescent breached such duty by selling the land without having built the building, thereby frustrating the purpose of the License Agreement, depriving plaintiff of the benefit of the bargain and reaping a windfall profit (Compl, ¶¶ 42-43). It is well-established that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (*see Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [breach of implied duty of good faith claim is invalid substitute for nonviable breach of contract calim]; *TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of covenant of good faith, because it was redundant of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of breach of the implied covenant claim where it was "merely a substitute for a nonviable breach of contract claim"]). Plaintiff, here, has failed to allege a breach of the License

Agreement, or any damages flowing from such a breach. Therefore, its implied duty of good faith claim based on the same allegations must be dismissed (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214, 214 [1st Dept], *lv dismissed in part, denied in part* 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]; *accord Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000] [breach of implied covenant claim dismissed as redundant of breach of contract claim]; *Business Networks of New York, Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999] [same]).

In addition, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, that intrinsic tie is apparent on the face of the complaint, where it seeks the identical damages sought in the breach of contract claim of not less than $45 million. Accordingly, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

The third cause of action, a contractual indemnification claim, is dismissed. This claim is based on Section 11 of the License Agreement, which provides that Crescent agreed to indemnify, defend, and hold harmless plaintiff, from and against any and all causes of action "arising in whole or in part, directly or indirectly, out of (i) Licensee's . . . acts or omissions in breach or default of this Agreement" (OtSC, Ex B, § 11, at 12). As determined above, there was

no breach of this agreement by Crescent's failure to build on the Tower Property. Therefore, there is no basis on which to seek indemnification. The Court also notes that this indemnification provision was not "unmistakably clear," or "exclusively or unequivocally referable to claims between the parties themselves" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492[1989]).

The fourth cause of action for unjust enrichment, asserted against Crescent and the individual defendants is dismissed. It is well-settled that where there is a valid and binding contract governing the subject matter of the parties' dispute, recovery for unjust enrichment for events arising out of the same subject matter is precluded (*see Apfel v Prudential-Bache Secs.*, 81 NY2d 470, 478-79 [1993]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [the agreement governs the subject of the dispute, and also bars the claims against the individual defendants even though they were not signatories to that agreement]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]). Here, the License Agreement governs the subject matter of the dispute over whether Crescent was obligated to build the condominium.

The fifth, sixth, and seventh causes of action, asserted against all the defendants and seeking recovery for fraudulent conveyances (constructive and actual fraud) and attorneys' fees under Debtor and Creditor Law §§ 273-276 and 276-a, all are dismissed. These claims assert that the distribution of the net proceeds of Crescent's sale of the Tower Property to the individual defendants was a conveyance to avoid Crescent's debt to plaintiff. These claims, however, are based on plaintiff's assertion that it is a creditor of Crescent because of Crescent's breach of the License Agreement. As determined above, there was no breach of that agreement by Crescent's

sale of the land, and there is no basis for indemnification under that agreement as well.

Therefore, plaintiff cannot establish itself as a creditor of Crescent, and the fraudulent conveyance claims fail (*see Salovaara v Eckert*, 6 Misc 3d 1005[A], 2005 NY Slip Op 50010 [U] *9 [Sup Ct, NY County 2005, Lowe, J.], *affd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]). The Court also notes that the individual defendants have submitted documentary evidence demonstrating that they were not members of Crescent, and that they did not receive the sale proceeds, providing an additional basis for dismissal of these claims against them.

Finally, the eighth cause of action for wrongful distribution is also dismissed, because it is based on the allegations that there was a breach of the License Agreement by the sale of the property and that the distribution of those proceeds was wrongful. Again, as determined above, there was no obligation by Crescent to build, and its sale of the property did not breach the License Agreement. Thus, there is no basis for a wrongful distribution claim.

The Court has considered the plaintiffs's remaining arguments, and considers them to be without merit.

In light of the above, plaintiff's cross motion for summary judgment in its favor on the first three causes of action is denied. In addition, its cross motion to amend to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants in this action on the ground that they are members of defendant Crescent and, as such, are liable on the fraudulent conveyance and wrongful distribution claims, is denied. As stated above, there is no basis for those causes of action because plaintiff has failed to plead a breach of the License Agreement and has not shown that it is a creditor of Crescent.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Crescent Heights Diamond, LLC is granted, and the complaint as against defendant Crescent Heights Diamond LLC is dismissed with costs and disbursements to defendant Crescent as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin is granted, and the complaint is dismissed as against these defendants with costs and disbursements to these individual defendants Kahn, Galbut, and Menin as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion to amend is denied.

Dated: December 22, 2008

ENTER:

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn Justice

PART 48m

Trump Marks LLC

INDEX NO. 601372/08

MOTION DATE

-v-

MOTION SEQ. NO. 002

Crescent Heights Diamond

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/23/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------x

TRUMP MARKS LLC,

Plaintiff,

-against-

Index No. 601372/08

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------x

Herman Cahn, J.:

Motion Sequence Numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order.

Defendants Crescent Heights Diamond, LLC (Crescent), Sonny Kahn, Russell W. Galbut, and Bruce A. Menin move to dismiss the complaint against them (CPLR 3211 [a] [1] and [7]). Plaintiff Trump Marks LLC cross-moves for an order granting it summary judgment on its claims (CPLR 3211 [c] and 3212), and for an order granting it permission to amend to add two new defendants (CPLR 1024).

This action arises from a licensing agreement between plaintiff and defendant Crescent, under which plaintiff licensed to Crescent the right to use the name "Trump Tower" in connection with a condominium building Crescent intended to build in Israel. Crescent failed to build the condo and, instead, sold the land to a third party for a profit. Plaintiff brought this action for breach of contract and unjust enrichment against Crescent. It also asserts claims

against the principals of Crescent, the individual defendants, for violations of the fraudulent conveyances law.

Defendant Crescent seeks dismissal, arguing that the license agreement provides that if it did not build within two years, for any reason within its control, plaintiff's remedy was termination. It argues that, if Crescent used the licensed marks after termination of the agreement, then plaintiff would have the right to damages. Crescent contends that there is no other remedy contemplated in the agreement, and that the Court should reject plaintiff's invitation to rewrite the agreement, made between sophisticated and counseled parties, to create other remedies. Crescent urges that plaintiff was nothing more than a licensor, not a partner in the transaction to develop a building.

The individual defendants, Kahn, Galbut and Menin, urge that the complaint be dismissed against them because they are not, and have never been members of Crescent, a limited liability company, and they did not receive any distribution of the sale proceeds from the sale of the land. Therefore, they argue that they cannot be required to return a conveyance or distribution they did not receive. They also argue that the unjust enrichment claim is barred because there is a written agreement, the license agreement, covering the matter. They urge that the fraudulent conveyance claim also is insufficient because the sale was not a breach of the license agreement, plaintiff failed to plead fraud with particularity and failed to plead the necessary elements of a fraudulent conveyance claim. They further argue that the wrongful distributions claim is insufficient because Crescent's liabilities do not exceed its assets.

BACKGROUND

Plaintiff is a Delaware limited liability company, and is in the business of licensing certain United States trademarks of Donald Trump, covering real estate and related services with the designation "Trump" (Compl, ¶ 2). Defendant Crescent, a Delaware limited liability company, is engaged in the business of building and developing first-class residential condominium properties (*id.*, ¶ 5). The individual defendants, Kahn, Galbut and Menin, are allegedly members of Crescent (*id.*, ¶¶ 6-11).

On May 23, 2006, plaintiff, as licensor, entered into an agreement with defendant Crescent, as licensee, in which plaintiff licensed the Trump name for Crescent's use in connection with the development of a building on land owned or to be acquired by Crescent in Ramat Gan, Israel (Indiv Def Order to Show Cause (OtSC), Ex B). Crescent intended to develop the building as a "first-class, luxury residential condominium" with a retail component; to design, develop, and operate it in the form of condominium ownership; and to market, sell, and/or lease the units in the building, all to be performed in accordance with the "Trump Standard" (therein defined), to maximize the value of the property for the benefit of both the licensor and the licensee (*id.*, at 1). The building to be constructed on the property was going to be the tallest structure in Israel with 786,000 square feet of space. It could not be constructed as a residential and retail development without obtaining variances from the appropriate Israeli authorities (Compl, ¶¶ 14, 27).

Pursuant to the License Agreement, Crescent was licensed to use the name "Trump Tower," or "Trump Plaza," which was then referred to in the agreement as the "New Trump Mark" (*id.*; *see also* OtSC, Ex B, First amend to License Agmt, at 1). It agreed to pay plaintiff

royalties for the rights granted in the agreement (*id.*, § 5 [a], at 9). Crescent also agreed to design, develop, construct, market, sell, equip, operate, repair and maintain the property with the level of quality and luxury associated with the condominium building known as the Akirov Building in Tel Aviv, Israel, referred to as the Signature Property in the License Agreement (*id.*, § 3 [a]).

In the License Agreement, plaintiff agreed to be subject to a covenant restricting its right to further license its name in the area. Specifically, the License Agreement stated that, "provided the Agreement was in full force and effect," until the first to occur of 42 months from the execution of the agreement, or the date on which 90% of the units are subject to binding contracts of sale, plaintiff would not license the name "Trump" for a residential condominium building within the area of Tel Aviv, Israel, and within 12 months from the date of the agreement, plaintiff would not license the "Trump" name for a "Condominium Hotel" as defined therein (*id.* at 4). Plaintiff agreed to cause Donald J. Trump to make one trip to the Tower Project for no more than one day of six working hours for the promotion of the project to the public (*id.*, § 1 [h]).

Plaintiff was permitted to terminate the agreement for "Trump Standard Defaults," such as Crescent failing, inter alia, to design, develop and maintain the property in accordance with the Trump Standard (*id.*, § 3, at 6-7), and for "non-Trump Standard Defaults" such as Crescent failing to pay money due (*id.*, § 7, at 10). Plaintiff was also permitted to terminate in "addition to any other right or remedy of Licensor" upon 10 days' written notice for reasons such as licensee's bankruptcy, fire damaging or destroying the building, the individual defendants ceasing to own and control the licensee, failure to commence construction within 24 months,

failure of the issuance of certain forms for the commencement of construction, and failure to close with regard to at least 70% of the units within 40 months (*id.*, § 8, at 10-11). The License Agreement provided that, notwithstanding its termination pursuant to any of its terms, plaintiff "shall be entitled to receive, and Licensee shall pay to Licensor all Royalties that have accrued to Licensor prior to the date of termination" (*id.*, § 8 [l], at 11).

The term of the License Agreement commenced upon its execution and "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark, and Licensor and Licensee have not agreed in writing or are not in substantive discussions for the use of a Trump Name as the name of the Tower Project" (*id.*, § 6, at 9).

The parties set forth their agreement with regard to royalties. They provided that an initial non-refundable payment of $1,000,000 was to be made to plaintiff on the date that Crescent is issued the initial construction permit for the commencement of construction. Crescent was further obligated to make royalty payments in connection with a percentage of the average aggregate sales prices per square foot, and a percentage of gross rental payments, of residential units and non-residential areas (*id.*, Ex A, at A-1).

In May 2006, plaintiff registered the licensed mark "Trump Plaza" with the Israeli Trademarks Office (Compl, ¶ 19).

In December 2006, Donald Trump, via a satellite video feed, spoke at the Israeli Business Conference, promoting and associating himself with the land and the Tower Project (*id.*, ¶ 20).

On April 30, 2007, Crescent acquired title to all of the constituent parcels constituting the land at a cost of approximately $44 million (*id.*, ¶ 17).

Crescent, however, asserts that it was unable to procure the necessary approvals to permit the construction of the Tower Property as a purely residential and retail property, as opposed to a mixed-use, residential, retail and office project, from the relevant Israeli authorities (*id.*, ¶ 25).

In or about August 1, 2007, plaintiff became aware that Crescent was negotiating to sell the land to a third party developer (*id.*, ¶ 21). On August 2, 2007, plaintiff notified Crescent that the sale of the land would result in Crescent's default under the License Agreement, causing substantial damage to plaintiff in that it would not receive royalties, its reputation would be damaged and Crescent would be unjustly enriched (*id.*, ¶ 22).

In January 2008, Crescent sold the land to Azorim Investment, Development and Construction Ltd. for approximately $80.2 million (*id.*, ¶¶ 23-24).

Plaintiff alleges that the sale was in breach of the License Agreement. It contends that section 3(a) of the License Agreement imposed an unqualified obligation on Crescent to design and construct the Tower Property. It argues that Crescent's obligations were not excused because it was unable to obtain the necessary approvals to build the Tower Property as envisaged (*id.*, ¶¶ 25-28). Plaintiff asserts that Crescent knew that it had to obtain permits, approvals, and/or variances from the authorities when it signed the License Agreement, and it failed to make bona fide efforts to obtain them (*id.*, ¶¶ 28, 31).

In the complaint, plaintiff asserts eight causes of action. The first three are against Crescent only for breach of the License Agreement; breach of the implied covenant of good faith and fair dealing by selling the land, and depriving plaintiff of the benefit of the License Agreement; and contractual indemnification for losses, attorneys' fees and disbursements in bringing this action. The remaining five causes of action are asserted against all the defendants.

The fourth is for unjust enrichment, claiming that the sale of the land resulted in a windfall profit for defendants which was realized by virtue of "the world renowned reputation of Donald J. Trump as the preeminent developer of luxury residential properties," and that defendants must make restitution to plaintiff of that windfall profit. The fifth and sixth are for fraudulent conveyances under the Debtor and Creditor Law §§ 273-276, and the seventh seeks attorneys' fees under Debtor and Creditor Law § 276-a. Finally, the eighth seeks recovery of the wrongful distribution of the net proceeds of the sale to the members of Crescent, in violation of New York Limited Liability Company Act § 508 or of section 18-607 of the Delaware Limited Liability Company Act.

In moving to dismiss, Crescent asserts that it did not construct the building, the required variances were not granted, no permit to construct the building was issued and the project never went forward to the final plans and specifications stage. Crescent argues that the License Agreement provides that if it did not build within two years for any reason within Crescent's control, plaintiff's only remedy was termination of the License Agreement and revocation of the license. With regard to royalties, Crescent asserts that it agreed to pay $1,000,000 to plaintiff if and when a construction permit were issued. It also agreed to pay additional royalties, if any, when any units in the building were sold, and provided they sold for more than a minimum price per square foot. None of these events occurred, so, Crescent argues, no royalties are due. Crescent contends that although the License Agreement could have provided for an initial, non-refundable payment upon signing, it did not. It also did not include any form of penalty or liquidated damages if the building was not built, nor did it include any clause which would provide plaintiff with a percentage of the profit if the land were resold. Crescent argues that

these provisions should not be read into the agreement, particularly where both parties are sophisticated and counseled. It urges that this was a non-exclusive licensing agreement which placed minimal restrictions on plaintiff's ability to exploit its mark worldwide.

Crescent also contends that the breach of the implied covenant claim is insufficient because it is redundant of the breach of contract claim. The indemnification claims fails because it depends upon a breach or default which Crescent asserts does not exist and because that provision refers to claims by third parties, not a breach of contract claim between Crescent and plaintiff. Crescent urges that the unjust enrichment claim fails because there is a contract that governs the subject matter of the parties' dispute. Crescent further urges that the remaining three claims for fraudulent conveyances and wrongful distribution must be dismissed because they are based on a breach of the License Agreement, and there was no breach.

In response; plaintiff cross-moves to have the motion to dismiss converted to a summary judgment motion, and for summary judgment in its favor on the first through third causes of action for breach of contract, breach of the covenant of good faith and indemnification. Plaintiff argues that there was a breach of the agreement by Crescent's failure to build. It asserts that in the first sentence of Section 3, Crescent expressly covenanted to design, build and construct the Tower Property. It urges that Crescent is inappropriately trying to use the title of the agreement, that is "License Agreement," and the caption of Section 3, "Trump Standard; Trump Standard Default: Power of Attorney," to twist the meaning of the "simple, straightforward promise to construct the Tower Property" (Opp Br. at 22). It contends that Crescent's interpretation does violence to Section 9 of the License Agreement, which gives Crescent the right to terminate only upon a substantial forced taking (by condemnation or eminent domain), or, if before 70% of the

units in the building are sold, Donald J. Trump dies, is permanently incapacitated, is no longer a principal of plaintiff, or for other specified reasons which did not occur (OtSC, Ex B, § 9, at 12).

Plaintiff also contends that Crescent's interpretation conflicts with Section 7 (b) regarding termination by Crescent following a default by plaintiff after notice and opportunity to cure. Further, plaintiff argues that Section 4, which compels Crescent to deliver plans and specifications to plaintiff, gives plaintiff the right to issue deficiency notices indicating its objections and gives both parties the right to terminate, supports its interpretation that Crescent could not terminate for whatever reason. It counters that Section 8 (h), upon which Crescent relies, is inapplicable, because it deals with construction delays, not a sale to a third party, and it would require plaintiff to wait two years to terminate its 3 ½ year negative covenant. Finally, Section 6, according to plaintiff, which specifies the term of the agreement, does not specify a sale of the property as the end of the term and, therefore, it cannot be relied upon by Crescent. Plaintiff urges that under its interpretation of the License Agreement, Crescent has breached as a matter of law and it is entitled to summary judgment of liability on its claims.

With respect to its implied covenant claim, plaintiff asserts that a promise to build should be implied and it is entitled to take discovery thereon. Plaintiff contends that its unjust enrichment claim cannot be dismissed unless its contract claim is granted. Plaintiff also contends that its indemnification claim should not be dismissed because Section 11 of the License Agreement covers action arising out of Crescent's "acts or omissions in breach or default of this Agreement" (*id.*, § 11, at 12).

The individual defendants seek dismissal of the claims against them on the ground that they are not, and never were, members of Crescent, and they did not receive any distribution of

the sales proceeds. They submit documentary evidence supporting this assertion (CPLR 3211 [a] [1]). They also seek dismissal of the fraudulent conveyance claims on the additional ground that plaintiff fails to plead fraud with particularity. They further argue that the claims are insufficient because they simply parrot the language in the statute and fail to contain any supporting facts. With respect to the wrongful distribution claim, again, they argue that they were not members of Crescent and that they did not receive any of the proceeds of the sale of the land.

Plaintiff cross-moves, in response to the individual defendants' motion, seeking permission to amend the complaint to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants (CPLR 1024), based on their identification by the individual defendants as the actual members of Crescent. It claims that it is not required to elect its remedies and may pursue its claim for unjust enrichment at the same time as its claim for breach of contract. It also argues that the documentary evidence does not establish that the individual defendants did not receive proceeds from the sale of the land, only that they were not members of Crescent.

DISCUSSION

The motions to dismiss by defendant Crescent and the individual defendants are granted, and the complaint is dismissed. Plaintiff's cross motion for summary judgment against Crescent on the first three causes of action is denied, and its cross motion to amend is also denied as moot.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "factual claims . . . flatly contradicted by documentary evidence are not entitled to such

consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citations omitted], *appeal denied* 80 NY2d 788 [1992]; *see Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994]). Moreover, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see e.g. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]), or conclusively establishes a defense to the asserted claims as a matter of law (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Here, even giving the complaint such a liberal construction, the Court, nevertheless, concludes that the License Agreement was not a promise by Crescent to build, it did not provide plaintiff with any remedy other than termination, and there was no breach of its provisions warranting dismissal of the breach of contract claim, as well as the other claims, many of which depend upon such a breach for their allegations.

The linchpin of this action is the first claim for breach of contract. In it, plaintiff asserts that the License Agreement obligated Crescent to design and build the Tower Property, market the condominium units for sale and pay plaintiff royalties, and that Crescent breached these obligations. This claim must be dismissed based on the clear and unambiguous language of the License Agreement and its purpose. Construction of an unambiguous contract is a matter of law appropriate for disposition by the Court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the Court must first look within the four corners of the document, and enforce it without recourse to parol evidence (*ABS Partnership v AirTran*

Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003]). The parties' agreement should be read as a whole to determine its purpose and intent (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162). It also should be construed as to give meaning and effect to all of its provisions (*id.*; *see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]). A contract does not become ambiguous just because the parties argue different interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). It should be construed and enforced according to its terms, particularly when it is drafted by "sophisticated and counseled business persons" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). The Court must interpret the contract, giving effect to the parties' expressed intentions and adopting an interpretation which gives effect to all of its provisions (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d at 28; *see also PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268 [1st Dept], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

The License Agreement is clear and unambiguous, and may be interpreted as a matter of law. First, as its title indicates, the agreement is a license agreement in which plaintiff agreed to allow Crescent to use the Trump Mark for a condominium building Crescent intended to build in Israel, and Crescent agreed to pay royalties for the use of the name (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 206 [1st Dept 2007], *lv dismissed* 10 NY3d 800 [2008] [court may look at headings in a contract to help interpret]). It did not obligate Crescent to build and market the condominium; it was simply a license arrangement (*see Long Island R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 461-62 [1977] [license agreement was not an obligation

to construct and operate a pipeline]). The contract provisions support this interpretation. In the third "Whereas" clause, Crescent states, in relevant part, that it

> intends to (i) develop a building . . . on certain land . . . owned or to be acquired by [Crescent] in Ramat Gan, Israel . . . which upon completion of construction will include a first-class, luxury residential condominium component, . . . and, a retail component . . . ; (ii) design, develop, construct and operate the Tower Property . . . in the form of condominium ownership; and (iii) market, sell and/or lease the units

(OtSC, Ex B, at 1 [emphasis added]). Crescent agreed that it would perform these activities in accordance with the "Trump Standard," as that is defined in the agreement (*id.*). Contrary to plaintiff's contention, there is no language in this "Whereas" clause, or anywhere else in the agreement, in which Crescent promised to build, construct and operate the condominium. Instead, it just indicated that Crescent intended to do so and that, if it did, it would pay plaintiff royalties for the use of its name.

Section 3(a), relied upon by plaintiff, also does not constitute a promise by Crescent to build. That provision is entitled "Trump Standard; Trump Standard Default; Power of Attorney." This title itself indicates that it was addressing the quality of the building – that it was to be built according to the "Trump Standard" (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d at 206 [it is appropriate to look at headings in interpreting the parties' agreement]; *Beltrone Constr. Co. v State of New York*, 189 AD2d 963, 966 [3d Dept], *lv denied* 81 NY2d 709 [1993] [look at headings in interpreting agreement]).

Section 3, subsections a and b, provide that if the building is built, Crescent agrees to design and develop the property with the level of quality and luxury associated with a building known as the Akirov Building in Tel Aviv, Israel, referred to as the "Signature Property," and

maintain it with the standards followed by the Signature Property, then referred to as the "Trump Standard." Subsection c provides that plaintiff would be the sole judge of whether Crescent was maintaining the Trump Standard. Subsection d provides that plaintiff would at all times have access to, and the right to inspect the property. Subsection e indicates that Crescent would sign a Power of Attorney so that plaintiff could register the agreement with the Israeli governmental authority. Thus, all of section 3, read together, addresses the purpose of that section, to ensure quality control, that is, to make sure that if the property is to bear the Trump Mark, Crescent would maintain a certain level of quality and luxury commensurate with that of the Signature Property. Contrary to plaintiff's contention, none of these provisions constitute a promise by Crescent to build. As Crescent aptly argues, both plaintiff and Crescent were sophisticated and well-counseled business entities and if they had intended to create a promise by Crescent to build, they could have easily drafted such a provision. They did not, and the Court will not imply such a promise.

This interpretation makes sense when considering that, at the time that the contract was entered into, Crescent did not own all the property that was needed to build the project (*see* Compl, ¶17). In fact, Crescent did not acquire title to all of the constituent parcels constituting the land for the project until almost a year after the License Agreement was executed (*id.*). Moreover, as pled in the complaint, Crescent needed to obtain a zoning variance to be able to build the property as it intended – residential and some retail, and without office space (*id.*, ¶ 26).

Section 8, which provides for plaintiff's right to terminate the agreement, further supports the conclusion that this was a license agreement, not a promise to build. Specifically, in section

8(h) plaintiff is granted the right to terminate the agreement and the rights licensed thereunder, upon 10 days' written notice, if

> (h) The construction of the Building fails to commence within twenty-four (24) months from the date of this Agreement, unless such delay shall result from any strikes, lockouts or labor disputes, . . . or other events similar to the foregoing beyond the reasonable control of [Crescent] (collectively, "Unavoidable Delays") in which event such twenty-four (24) month period shall be deemed extended one (1) day for each day of Unavoidable Delay . . .

(OtSC, Ex B, § 8[h], at 11). Thus, if the construction does not begin within two years because of avoidable delays, that is, delays within Crescent's control, plaintiff could terminate the License Agreement and any rights licensed under it. The parties thus provided a remedy to plaintiff if Crescent failed to begin construction of the building – termination and revocation of the license. The other subsections of Section 8 provide additional situations under which plaintiff could terminate the license, such as Crescent's bankruptcy, insolvency, the building is destroyed by fire, the property is taken by condemnation or eminent domain and closings for at least 70% of the units have not taken place within 40 months (*id.*, at 10-11). Finally, in subsection l, the parties provided that, notwithstanding the termination of the agreement, plaintiff would still be entitled to royalties that accrued prior to the termination (*id.*, § 8[l]). Section 8 clearly provides, therefore, that in the event of plaintiff's termination of the agreement, for example, for failure to begin construction based on avoidable delay by Crescent, plaintiff's remedies were termination and royalties that accrued prior to such termination. It does not provide, as plaintiff seeks here, damages for windfall profits if the land were sold and the construction permit was never issued. Again, if the parties, who were sophisticated business entities, sought to include a liquidated damages provision, or a provision that failure to begin construction would be a breach or default

under the agreement, they could have so provided, but they did not. The Court will not write a new agreement for the parties under the guise of contract interpretation.

Section 14, entitled "Representations and Warranties: Covenants," sets forth the representations of both parties. In subsection b, referring to Crescent's representations, Crescent makes representations about its corporate standing and its ability to enter into the agreement. There is, however, no covenant that Crescent was covenanting or promising to build, or promising to use good faith efforts to build.

Section 9, relied upon by plaintiff, does not conflict with this interpretation. Section 9, entitled "Licensee's Termination," provides Crescent with a reciprocal right to termination. It states that, "[n]otwithstanding anything to the contrary herein, including but not limited to Paragraph 7 (b)," regarding plaintiff's default and time to cure, Crescent has the absolute right to terminate if the building is taken in condemnation or eminent domain, or if before 70% of the units are sold, Donald Trump dies, goes into bankruptcy, is no longer a principal of plaintiff, or is convicted of a felony (*id.*, § 9, at 11-12). Like Section 8, it limits Crescent to the right to terminate as its remedy. The provision cannot be construed as a promise to build, or an agreement that Crescent could not terminate based on its own failure or inability to construct the building. It further supports the reading that the parties had a reciprocal right to terminate, and that the only damages which naturally flowed from breach and which were contemplated were royalties to plaintiff if they had accrued prior to termination (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-22 [1989][unusual or extraordinary damages limited to those in parties' contemplation]).

Plaintiff's argument that under Crescent's interpretation, the restrictive covenant in

Section 1 of the License Agreement requires plaintiff to continue not to use the New Trump Mark in the relevant area for 3 ½ years, even after the land was sold, fails to take into account all of the language in that section. In subsection g of Section 1, the first clause provides that "provided that . . . this Agreement is in full force and effect," then plaintiff is required to abide by the restrictive covenant (*id.*, § 1[g], at 4). It is apparent that when the land was sold to a third party, the License Agreement was no longer in full force and effect and, therefore, plaintiff was not still subject to the restrictive covenant therein.

Section 7 (b) fails to provide support for plaintiff's reading of the agreement. It simply provides that if plaintiff is in default in any of its material obligations, and the default is not cured within 30 days after notice, then Crescent may terminate the agreement. It has nothing to do with any promise to build, or the situation where there is no building and construction has not commenced. Similarly, Section 4, like Section 3, is all about meeting the Trump Standard by submitting plans and specifications. It does not include a promise or covenant by Crescent to build. Section 6 simply provides that the term of the agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark" (*id.*, § 6, at 9). This, like the other sections relied upon by plaintiff, cannot be construed to convert this agreement from purely a license agreement into a promise by Crescent to build the building.

In *Long Island R.R. Co. v Northville Indus. Corp.* (41 NY2d 455), the Court of Appeals considered and rejected a similar argument that a license agreement, regarding the installation and use of an oil pipeline along plaintiff's right of way, obligated the defendant to construct the oil pipeline. In the parties' agreement, which was characterized in the agreement as a license

agreement, the plaintiff railroad granted the defendant the right and privilege to construct, install, use, operate and maintain a pipeline along the plaintiff's right of way. The defendant agreed to pay the railroad $10,000 in advance, during which the defendant would procure the necessary consents, permits or other authority and construct the pipeline and, after construction or a three-year period had passed, then defendant would pay a certain fee based on the size of piping or the output, with a guaranteed minimum of $20,000 per year. The agreement provided for cancellation rights by the defendant within the first three years and, by the railroad, if defendant did not complete at least half of the pipeline during that three-year period. The Court held that the express terms of the agreement did not obligate the defendant to construct and operate a pipeline along the railroad's right of way. "The agreement was purely and simply a license arrangement" (*id.* at 461). It found that to construe the various portions of the agreement in such a way as "to place an obligation on Northville to exercise the privilege granted to it, as urged by the railroad, would be contrary to the obvious intention of the parties as expressed therein" (*id.*). The Court further rejected the railroad's argument, similar to plaintiff's argument in the instant case, that even in the absence of an express contractual requirement to build the pipeline, defendant should be impliedly obligated to construct, operate and maintain a pipeline (*id.*). It found that the agreement "manifests that had such an obligation been intended, it would have been expressed" (*id.* at 462).

Similarly, here, the agreement was purely a license agreement, as its name implies. The agreement states that Crescent "intends to build," and never indicates that it promised to build. It makes sense that there was no promise to build since Crescent did not yet own the parcels of land, or have the approvals required to build the condominium it was intending to build. To

construe the provisions plaintiff relies upon to obligate Crescent to build would be contrary to the intention of the parties as expressed in the License Agreement (*see id.*). Moreover, plaintiff's argument that even if there was not an express requirement in the agreement to build, Crescent should be implicdly obligated to construct the building is rejected. As in the *Northville* case, this agreement manifests that had such an obligation been intended, it would have been expressed in the License Agreement.

Therefore, the License Agreement does not obligate Crescent to build, and plaintiff cannot assert the failure to build as a breach of the agreement. Accordingly, there is no breach of contract, warranting dismissal of the first cause of action.

The second cause of action, for breach of the implied duty of good faith and fair dealing also is dismissed. Plaintiff alleges that Crescent breached such duty by selling the land without having built the building, thereby frustrating the purpose of the License Agreement, depriving plaintiff of the benefit of the bargain and reaping a windfall profit (Compl, ¶¶ 42-43). It is well-established that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (*see Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [breach of implied duty of good faith claim is invalid substitute for nonviable breach of contract calim]; *TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of covenant of good faith, because it was redundant of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of breach of the implied covenant claim where it was "merely a substitute for a nonviable breach of contract claim"]). Plaintiff, here, has failed to allege a breach of the License

Agreement, or any damages flowing from such a breach. Therefore, its implied duty of good faith claim based on the same allegations must be dismissed (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214, 214 [1st Dept], *lv dismissed in part, denied in part* 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]; *accord Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000] [breach of implied covenant claim dismissed as redundant of breach of contract claim]; *Business Networks of New York, Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999] [same]).

In addition, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, that intrinsic tie is apparent on the face of the complaint, where it seeks the identical damages sought in the breach of contract claim of not less than $45 million. Accordingly, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

The third cause of action, a contractual indemnification claim, is dismissed. This claim is based on Section 11 of the License Agreement, which provides that Crescent agreed to indemnify, defend, and hold harmless plaintiff, from and against any and all causes of action "arising in whole or in part, directly or indirectly, out of (i) Licensee's . . . acts or omissions in breach or default of this Agreement" (OtSC, Ex B, § 11, at 12). As determined above, there was

no breach of this agreement by Crescent's failure to build on the Tower Property. Therefore, there is no basis on which to seek indemnification. The Court also notes that this indemnification provision was not "unmistakably clear," or "exclusively or unequivocally referable to claims between the parties themselves" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492[1989]).

The fourth cause of action for unjust enrichment, asserted against Crescent and the individual defendants is dismissed. It is well-settled that where there is a valid and binding contract governing the subject matter of the parties' dispute, recovery for unjust enrichment for events arising out of the same subject matter is precluded (*see Apfel v Prudential-Bache Secs.*, 81 NY2d 470, 478-79 [1993]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [the agreement governs the subject of the dispute, and also bars the claims against the individual defendants even though they were not signatories to that agreement]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]). Here, the License Agreement governs the subject matter of the dispute over whether Crescent was obligated to build the condominium.

The fifth, sixth, and seventh causes of action, asserted against all the defendants and seeking recovery for fraudulent conveyances (constructive and actual fraud) and attorneys' fees under Debtor and Creditor Law §§ 273-276 and 276-a, all are dismissed. These claims assert that the distribution of the net proceeds of Crescent's sale of the Tower Property to the individual defendants was a conveyance to avoid Crescent's debt to plaintiff. These claims, however, are based on plaintiff's assertion that it is a creditor of Crescent because of Crescent's breach of the License Agreement. As determined above, there was no breach of that agreement by Crescent's

sale of the land, and there is no basis for indemnification under that agreement as well. Therefore, plaintiff cannot establish itself as a creditor of Crescent, and the fraudulent conveyance claims fail (*see Salovaara v Eckert*, 6 Misc 3d 1005[A], 2005 NY Slip Op 50010 [U] *9 [Sup Ct, NY County 2005, Lowe, J.], *affd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]). The Court also notes that the individual defendants have submitted documentary evidence demonstrating that they were not members of Crescent, and that they did not receive the sale proceeds, providing an additional basis for dismissal of these claims against them.

Finally, the eighth cause of action for wrongful distribution is also dismissed, because it is based on the allegations that there was a breach of the License Agreement by the sale of the property and that the distribution of those proceeds was wrongful. Again, as determined above, there was no obligation by Crescent to build, and its sale of the property did not breach the License Agreement. Thus, there is no basis for a wrongful distribution claim.

The Court has considered the plaintiffs's remaining arguments, and considers them to be without merit.

In light of the above, plaintiff's cross motion for summary judgment in its favor on the first three causes of action is denied. In addition, its cross motion to amend to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants in this action on the ground that they are members of defendant Crescent and, as such, are liable on the fraudulent conveyance and wrongful distribution claims, is denied. As stated above, there is no basis for those causes of action because plaintiff has failed to plead a breach of the License Agreement and has not shown that it is a creditor of Crescent.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Crescent Heights Diamond, LLC is granted, and the complaint as against defendant Crescent Heights Diamond LLC is dismissed with costs and disbursements to defendant Crescent as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin is granted, and the complaint is dismissed as against these defendants with costs and disbursements to these individual defendants Kahn, Galbut, and Menin as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion to amend is denied.

Dated: December 22, 2008

ENTER:

J.S.C.

STATE OF COUNTY ss.

I, the undersigned, an attorney admitted to practice law,

Check Applicable Box

☐ Certification By Attorney

certify that the within has been compared by me with the original and found to be a true and complete copy.

☐ Attorney's Affirmation

state that I am the attorney(s) of record for in the within action; I have read the foregoing and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.:

I, being duly sworn, depose and say: I am

Check Applicable Box

☐ Individual Verification

the in the within action: I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

☐ Corporate Verification

the of a corporation and a party in the within action; I have read the foregoing and know the contents thereof: and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief. and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

.....
The name signed must be printed beneath

STATE OF COUNTY OF ss.: (If both boxes are checked—indicate after names, type of service used.)

I, being sworn, say: I am not a party to the action, am over 18 years of age and reside at

On I served the within

Check Applicable Box

☐ Service By Mail

by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within this State, addressed to each of the following persons at the last known address set forth after each name:

☐ Personal Service on Individual

by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as *a party therein:*

Sworn to before me on

.....
The name signed must be printed beneath

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

TRUMP MARKS LLC,

Plaintiff,

Index No.: 601372/08

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

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ORDER TO SHOW CAUSE AND SUPPORTING AFFIRMATION

MEISTER SEELIG & FEIN LLP

Attorney(s) for *Plaintiff*

2 Grand Central Tower
140 East 45th, 19th Floor
NEW YORK, NEW YORK 10017
(212) 655-3500

To

Service of a copy of the within is hereby admitted.

Dated: .....

Attorney(s) for .....